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In The

Supreme Court of the United States

NGC SETTLEMENT TRUST and
ASBESTOS CLAIMS MANAGEMENT CORPORATION,

Petitioners,

vs.

CENTURY INDEMNITY COMPANY and
INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does section 1141 of the Bankruptcy Code discharge a debtor's payment obligations existing at the time of confirmation of a bankruptcy reorganization plan with respect to pre-confirmation benefits under an executory contract assumed in the plan, where section 1141 discharges the debtor from all "debt" that exists at the time the plan is confirmed, and where "debt" is defined in the Bankruptcy Code to mean the debtor's "liability on a claim," and "claim" is defined to include any "right to payment"?

2. Where a debtor in-possession assumed an executory contract as part of a plan of reorganization and complied with the notice requirements of Rule 3017 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") governing plans of reorganization, are the Bankruptcy Court's cure determinations with respect to the assumption binding on the non-debtor party to the assumed contract, where the debtor in possession did not also give notice of assumption under Bankruptcy Rule 6006, which governs notice of assumption of contracts "other than as part of a plan"?

CORPORATE DISCLOSURE STATEMENT UNDER RULE 29.6

Petitioner NGC Settlement Trust (the "Trust") is the owner of 100% of the stock of Petitioner Asbestos Claims Management Corporation ("ACMC"). Although not publicly traded, beneficial interests in the Trust are held by numerous holders of "Asbestos Disease Claims" and "Asbestos Property Damage Claims" against ACMC, formerly known as National Gypsum Company.

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PETITION FOR WRIT OF CERTIORARI

Asbestos Claims Management Corporation ("ACMC") and NGC Settlement Trust ("Trust") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit (the "Court of Appeals").

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 208 F.3d 498 (5th Cir. 2000).[1] The opinion and order dated August 27, 1998, of the United States District Court for the Northern District of Texas (the "District Court") are set forth in Appendix B, and the opinion is unofficially reported at 1998 WL 574890 (N.D. Tex. Aug. 27, 1998) and 12 Tex. Bankr. Ct. Rep. 565. The September 12, 1997, final judgment of the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") (Appendix C), the July 18, 1997, order of the Bankruptcy Court (Appendix D), the transcript of the Bankruptcy Court's March 30, 1997, ruling (Appendix E), the order of the Bankruptcy Court dated October 22, 1996 (Appendix F), and the transcript of the Bankruptcy Court's September 20, 1996, ruling (Appendix G) are unreported.

[1] At the date of this writing, the version of the Court of Appeals' opinion reported in the soft-cover advance copy of the Federal Reporter is the original March 31, 2000, version. Appendix "A" contains a corrected April 14, 2000, version of the opinion.

JURISDICTION

The Court of Appeals entered its judgment on March 31, 2000. ACMC and the Trust invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) (1994), and this Petition for Writ of Certiorari is filed under 28 U.S.C. § 2101(c) (1994).

STATUTES AND RULES INVOLVED

Statutes. The Bankruptcy Code, 11 U.S.C. § 1141(d)(1) (1994), provides, in part, "Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation . . . . "

The Bankruptcy Code, 11 U.S.C. § 101(12) (1994), provides that " 'debt' means liability on a claim."

The Bankruptcy Code, 11 U.S.C. § 101(5) (1994), provides, in part, that " 'claim' means . . . right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . . "

The Bankruptcy Code, 11 U.S.C. §§ 365(a) & (b)(1)(A) (1994), provides, in relevant part,

> (a) [T]he trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor,

> the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –
>
> > (A) cures, or provides adequate assurance that the trustee will promptly cure, such default; . . . .

The above-cited statutes and sections 101(10), 365(g), 502(g), and 503(b)(1)(A) of the Bankruptcy Code are set forth in Appendix H.

Bankruptcy Rules. Federal Rules of Bankruptcy Procedure 1001, 3003(c)(2), 3017, 6006(a) and (c), and 9014 are set forth in Appendix I.

STATEMENT OF THE CASE

This case presents two questions important to bankruptcy reorganizations. First, can a reorganized debtor be saddled with pre-discharge liabilities under assumed executory contracts, where at the time of the assumption of the contract and confirmation of the plan, the debtor did not know of any alleged liability and the claimant had not asserted its claim? Second, what type of notice to the non-debtor party is required to bind the non-debtor to a determination of the amount needed to "cure" defaults under the contract at the time of assumption?

Review by this Court is appropriate because the decision of the Court of Appeals raises questions of importance in the administration of the Bankruptcy Code, *cf. United States v. Ruzicka*, 329 U.S. 287, 288 (1946) (certiorari granted to consider questions of importance in administration of statute), and because of the gravity to the administration of bankruptcy cases of the decision of the

Court of Appeals creating unwritten exceptions to the definition of "claim" and "debt" subject to discharge. *Cf. Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 299 (1946) (certiorari granted because of gravity of lower court holding to administration of tax laws).

ACMC is the former National Gypsum Company ("National Gypsum"). In 1985, several former producers or distributors of asbestos or asbestos-containing products (including National Gypsum) and certain of their liability insurers (including Insurance Company of North America ("INA")) entered into the so-called "Wellington Agreement." The Wellington Agreement settled certain coverage issues and established a facility to review, defend, and settle asbestos-related bodily-injury claims.

Not all insurers participated in the Wellington Agreement. Therefore, for example, in a given policy year National Gypsum could have a $5,000,000 layer of primary insurance coverage issued by a Wellington participant, $5,000,000 in excess coverage issued by a non-participant, and another $5,000,000 layer of excess coverage issued by a Wellington participant. Section XX of the Wellington Agreement provided that the participating insurers would make gap-filling payments, thereby possibly accelerating the time when an insurer begins to make payments. In the foregoing example, if the primary coverage was paid out and the non-participating excess insurer declined to pay its layer of coverage, the participating excess insurer would begin paying out on its coverage without waiting for National Gypsum to collect the amounts owed by the non-participant. Respondents and ACMC dispute the meaning of a provision in Section XX calling for the insureds to pay interest on the accelerated

payment ("Section XX Interest"). Respondents generally claim that interest would begin to run beginning two years after an accelerated payment was made, continuing until such time as the insurer would otherwise have exhausted its coverage without gap-filling payments.

From October 1987 through May 1990, INA made what it claims were accelerated payments on behalf of National Gypsum.[2] Under Respondents' interpretation of Section XX, INA became entitled to interest on those payments beginning in October 1989.

On October 29, 1990, National Gypsum filed its bankruptcy petition in the Bankruptcy Court. INA had not asserted any claim for Section XX interest up to that time. INA received notice of the commencement of the bankruptcy case and of the proof of claim bar date or deadline,[3] but it never filed a claim and never otherwise notified National Gypsum of a Section XX claim.

In October 1992, National Gypsum filed its plan of reorganization. The plan proposed to assume the Wellington Agreement along with other agreements, and stated that according to National Gypsum's review of its records, $0 was needed to cure existing defaults under the Wellington Agreement. It is disputed whether INA was sent a copy of the plan or the disclosure statement.

On March 9, 1993, the Bankruptcy Court confirmed National Gypsum's plan. In conformity with 11 U.S.C.

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[2] Supplemental Record ("S.R.") 1090, 1110, 1114-16; 1133, 1141, 1152-56.

[3] S.R. 1231-38, 1239, 1248-52, 1253-56.

§ 1141(d), the Confirmation Order includes a broad discharge of all "claims" arising prior to the confirmation date. Also pursuant to the plan, the Trust was created to own ACMC and hold proceeds from ACMC's sales of its operating businesses and proceeds from ACMC's insurance policies and to pay asbestos claimants.

In July 1995, INA for the first time demanded that ACMC and the Trust pay nearly $5,000,000, consisting of Section XX interest and interest on the Section XX interest.

On October 20, 1995, ACMC and the Trust commenced a declaratory judgment action in the Bankruptcy Court pursuant to 28 U.S.C. § 1334(b) and 11 U.S.C. §§ 524 and 1141, seeking a declaration that INA's preconfirmation claims against ACMC and the Trust under the Wellington Agreement had been discharged by confirmation of the plan.[4]

In October 1996, the Bankruptcy Court granted a motion for summary judgment filed by ACMC and the Trust. (Apps. F & G) Century sought reconsideration based on the Court of Appeals' decision in *Wainer v. A.J. Equities*, 984 F.2d 679 (5th Cir. 1993). The Bankruptcy Court modified its ruling, finding that *Wainer* precluded discharge, but that as to the portion of INA's claim that was in default as of the confirmation date, Century was bound by the $0 cure amount contained in the plan. (Apps. C, D & E).

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[4] During the litigation, INA was succeeded by Respondent Century Indemnity Company ("Century").

Both sides appealed to the District Court. In August 1998, the District Court affirmed the ruling on discharge but reversed the ruling that Century was bound by the $0 cure amount, holding in part that the $0 cure amount could be binding only if National Gypsum had sent INA certain types of notice. (App. B at 10) ACMC and the Trust appealed. On March 31, 2000, the Court of Appeals affirmed and remanded for determination of whether INA received such notice.

REASONS FOR GRANTING WRIT OF CERTIORARI

In *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581, 591-92 (1916), this Court noted:

> Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the [Bankruptcy Act] in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform.

In holding that parties to an executory contract have no "claim" subject to discharge unless the contract is rejected, the Court of Appeals partially reinstitutes the "unfortunate" situation condemned by this Court in *Chicago Auditorium*. Under the ruling of the Court of Appeals, (1) the non-debtor party to the contract is in limbo without a "claim" entitling it to participate as a

creditor, and (2) if a debtor in possession assumes a contract, the reorganized debtor could face potentially ruinous, hitherto unknown, obligations arising from its pre-bankruptcy past. Furthermore, the imposition of a notice requirement not found in the Federal Rules of Bankruptcy Procedure imposes unwarranted uncertainty and burdens on a debtor assuming a contract.

I. PROPER ADMINISTRATION OF THE BANKRUPTCY CODE REQUIRES THAT A DEBTOR'S UNKNOWN AND UNASSERTED PRE-CONFIRMATION LIABILITIES UNDER EXECUTORY CONTRACTS BE RESOLVED BY DISCHARGE, NOT BY POST-CONFIRMATION LITIGATION.

A. Treatment of Executory Contracts.

If left undisturbed, the Court of Appeals' ruling will cause fundamental misunderstanding of the treatment of executory contracts in bankruptcy throughout the United States.

Commencement of a bankruptcy case creates an estate consisting of the property of the bankrupt debtor as of the commencement of the case. 11 U.S.C. § 541(a)(1) (1994). The Bankruptcy Code provides for the appointment of a trustee with various powers over the estate, 11 U.S.C. § 323(a) (1994). In a chapter 11 reorganization case, the debtor, referred to as a "debtor in possession," ordinarily exercises the powers of the trustee. 11 U.S.C. § 1101

(1994) (definition of "debtor in possession"); § 1107 (powers of a debtor in possession).[5]

The "actual, necessary costs and expenses of preserving the estate" incurred by the trustee or debtor in possession during administration of the estate are generally allowed as "administrative expenses," 11 U.S.C. § 503(b)(1)(A) (1994), and enjoy priority in payment from the estate. 11 U.S.C. § 507(1) (1994). In a simple liquidation case, the trustee distributes assets remaining after administrative expenses among the debtor's creditors according to the amount of their claims. Because estate assets are usually less than the amount of claims, each creditor receives only a pro rata share of its claim. 11 U.S.C. § 727(b) (1994). The holder of an administrative claim, therefore, is in a superior position to that of an ordinary pre-petition creditor.

In a Chapter 11 reorganization case, the debtor in possession typically proposes a "plan of reorganization" whereby creditors receive cash, notes, or equity interests in the reorganized debtor with a value at least equal to what the creditors would receive in a simple liquidation. 11 U.S.C. § 1129(a)(7)(A)(ii) (1994). In most Chapter 11 reorganization cases, the debtor receives a "discharge" of all "debt" that arose before confirmation of the plan. 11 U.S.C. § 1141(d). Administrative expenses are claims subject to discharge like other claims. *In re Benjamin Coal Co.*, 978 F.2d 823, 827 (3d Cir. 1992).

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[5] National Gypsum (now ACMC) was the debtor in possession in this case.

One of the powers of a trustee or debtor in possession during the administration of the estate is the power to "assume" or "reject" the debtor's executory contracts. 11 U.S.C. § 365(a).

> Assumption is the trustee's decision to bind the estate administratively to perform the debtor's obligations under a prepetition contract, thereby elevating the nondebtor party to [administrative] priority. Rejection, by contrast, is simply the trustee's decision not to do so, not to perform the debtor's remaining contractual obligations administratively.[6]

If the trustee or debtor in possession elects for the estate to continue to receive benefits under the contract pending any decision to assume or reject, the estate must pay the "reasonable value" of the benefits, which may, but need not, be the price specified in the contract. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984). If the contract is assumed, the estate becomes obligated to pay for the benefits it receives as specified in the contract. *Id.*

Section 365 states other consequences of assumption or rejection. If a contract is rejected, the rejection is deemed to have been a breach of the contract immediately prior to the filing of the bankruptcy petition, 11 U.S.C. § 365(g)(1) (1994). Any claim arising from that

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[6] NATIONAL BANKRUPTCY CONFERENCE, REFORMING THE BANKRUPTCY CODE, at 120 (Final Report, Revised Edition May 1997). The National Bankruptcy Conference is a non-profit organization of "lawyers, law teachers, and bankruptcy judges who have achieved scholarly distinction in the field of bankruptcy law." <http://www.law.uchicago.edu/NBC/NBC.htm>

deemed breach is treated as if it had arisen prior to the bankruptcy petition. 11 U.S.C. § 502(g) (1994). For example, upon rejection, sections 365(g) and 502(g) may give the non-debtor under a long-term contract to sell goods to a debtor a claim for standard Uniform Commercial Code ("UCC") damages for anticipatory breach of the debtor's obligation to accept and pay for the goods. By contrast, the Bankruptcy Code does not contain a special provision for claims that already existed prior to the deemed breach (such as UCC damages for goods delivered prior to the bankruptcy), because those claims were already "claims" within the broad definition of "claim" in 11 U.S.C. § 101(5). The effect of the "deemed breach" upon rejection and the definition of "claim" is that the non-debtor party to a rejected contract is treated just as ordinary creditors are, with no claim to administrative priority.[7]

If the trustee wishes instead to assume the contract, the trustee must cure any "defaults" under the contract. 11 U.S.C. § 365(b)(1)(A). That obligation, like the estate's subsequent obligation to pay for the benefits received under the assumed contract, is an administrative expense entitled to priority. 11 U.S.C. § 503(b)(1)(A); *Bildisco*, 465 U.S. at 532.

Assumption or rejection of a contract thus determines whether the estate itself has an administrative

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[7] If the non-debtor had provided some benefits during the period when the trustee's decision on assumption or rejection was pending, the non-debtor would be entitled to receive the "reasonable value" of those benefits as an administrative expense. *Bildisco*, 465 U.S. at 531.

obligation to pay certain amounts owed under the contract, or whether instead the contract obligations are paid out of the assets remaining after administrative expenses. As demonstrated in the next section, however, the Court of Appeals transformed this issue of estate administration into an unwritten exemption from the clear statutory discharge of all debts upon confirmation of a reorganization plan, and in so doing called into question the bankruptcy status of all obligations under executory contracts.

B. A Debtor's Obligations under Executory Contracts Must Be Dischargeable to Effectuate the Purposes of the Bankruptcy Code.

The debtor's right to a "fresh start" is a fundamental principle of American bankruptcy law. *See, e.g., Williams v. United States Fidelity & Guar. Co.*, 236 U.S. 549, 554-55 (1915). In Chapter 11 reorganization cases, the "fresh start" is implemented through 11 U.S.C. § 1141(d), which provides, in relevant part:

> (1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –
>
> > (A) discharges the debtor from any debt that arose before the date of such confirmation . . . .

"Debt" means "liability on a claim." 11 U.S.C. § 101(12). "Claim" means a "right to payment, whether or not such right to payment is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). A non-

debtor's right to be paid under a contract is a "claim." *See generally Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) ("Congress intended by this language to adopt the broadest available definition of 'claim.' ") (citations omitted). As applied to the present case, if Century's current reading of Section XX is correct, INA's "accelerated" payments beginning in October 1987 gave rise to a claim by INA against National Gypsum as the accelerated payments were made, a claim which became payable as the rolling two-year waiting period expired beginning in October 1989. INA had a disputed, contingent, unmatured right to payment of interest that arose as it made accelerated payments from October 1987 through May 1990. That right was a "claim," and sections 1141(d) and 101(5) of the Bankruptcy Code plainly provide for its discharge.

The Court of Appeals, however, held that unless an executory contract is rejected, no "claim" arises under the contract,[8] and thus there is no discharge of obligations under a non-rejected executory contract. That holding disregards the plain meaning of the definition of "claim" and threatens significant disruption to the administration

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[8] *See, e.g.*, App. A at 11 ("The non-debtor . . . only becomes an unsecured creditor after rejection. Therefore the non-debtor is not required to have filed a proof of claim prior to the claims bar date . . . . "); App. A at 16-17 ("a claim arises only from the rejection of an . . . executory contract, not from the assumption of such a . . . contract."). Sometimes, the Court of Appeals' opinion refers in this context only to "default amounts" or "amounts in default," App. A at 14, 21. Amounts not yet in default, however, can be "claims" under 11 U.S.C. § 101(5) ("claim . . . means a right to payment, whether or not . . . matured . . . . ").

of bankruptcy cases and the expectations of parties to contracts.

The words of the definition of "claim" in 11 U.S.C. § 101(5) are unambiguous on this point. "Claim" means a "right to payment." If the debtor, for example, is a party to a partially-performed long-term supply contract, and has received goods under the contract, the other party's right to receive payment for those goods is a "right to payment" and therefore is a "claim" under section 101(5), and the debtor's obligation to pay for those goods is therefore a "debt" under section 101(12). As the National Bankruptcy Conference has observed, "It seems impossible to argue that the obligations of an executory contract . . . do not constitute a 'claim,' . . . . "[9]

If the Court of Appeals is correct, however, that no claim exists under an executory contract until rejection, then a non-debtor party to such a contract is not a "creditor" under section 101(10) (" 'creditor' means an entity that has a claim against a debtor . . . . "); is not entitled to notice of the commencement of the bankruptcy case, Fed. R. Bankr. P. 2002; is not entitled to participate in the meeting of creditors under 11 U.S.C. § 341 (1994); and is not entitled to participate on or be represented by a creditors' committee. *See, e.g., In re Advisory Comm. of Major Funding Corp.*, 109 F.3d 219, 224 (5th Cir. 1997) (holding that committee must act in best interests of creditors represented by committee). The lack of a "claim" until rejection would also re-write 11 U.S.C. § 546(c) (1994), which recognizes the common-law and

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[9] REFORMING THE BANKRUPTCY CODE, *supra* note 6, at 144.

UCC right of a supplier of goods to reclaim the goods upon the buyer's insolvency.[10] Debtors, particularly in large commercial cases, can be parties to hundreds of executory contracts or leases, such as those with long-term suppliers, service providers, insurance carriers, customers, and landlords. (National Gypsum, for example, listed over 270 executory contracts and leases on a schedule to its reorganization plan.) Because the decision to reject a contract can be made late in the bankruptcy process, those hundreds of non-debtors would lack status as "creditors" during many of the crucial stages of formulating a plan of reorganization, including even voting on the plan.[11] The ruling that a non-debtor party has no "claim" under an executory contract until rejection, therefore, threatens to deprive many parties of their right to participate and protect their interests in a bankruptcy and to disrupt the administration of many bankruptcy cases in the country.

The Court of Appeals' ruling also makes no sense as a matter of policy. If non-debtor merchant "A" had shipped goods to the debtor under a simple sales contract for a single delivery that remained unpaid for at the time

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[10] Ordinarily the Bankruptcy Court can deny reclamation if the court grants the seller's "claim" administrative priority or secures the "claim" by a lien. 11 U.S.C. § 546(c)(2). If the seller under an unrejected executory contract has no "claim" then subsection 546(c)(2) cannot apply.

[11] A plan of reorganization may provide for the rejection of executory contracts. 11 U.S.C. § 1123(b)(2) (1994). Rejection would not occur until, at the earliest, confirmation of the plan, so under the holding of the Court of Appeals, the non-debtor parties to such contracts would not yet be "creditors" entitled to vote on the plan under 11 U.S.C. §§ 1126 and 1129(a)(7) (1994).

of bankruptcy, A would have a clear bankruptcy "claim" for the unpaid amount owed. If non-debtor merchant "B" had sent the last of ten scheduled shipments to the debtor, B likewise would have a claim for whatever amounts were unpaid for all shipments. If, however, non-debtor merchant "C" had a similar contract except that one shipment remained to be made (thus rendering the contract "executory"), the Court of Appeals' ruling means that C's "right to payment" for the prior nine shipments is somehow not a "claim" unless and until such time as the debtor in possession or trustee rejects the contract. There is no reason to read an unwritten provision into the Bankruptcy Code that would treat A, B, and C's respective "rights to payment" for shipped goods differently based on the happenstance of whether additional shipments were due. The Bankruptcy Code definitions of "debt" and "claim" in sections 101(5) and 101(12) are broad and include any "right to payment."

C. Section 365 of the Bankruptcy Code Does Not Restrict the Definition of "Claim" or the Extent of Discharge.

The Court of Appeals relied on 11 U.S.C. §§ 365(g) and 502(g) to support its ruling that the definitions of "claim" and "debt" contained an unwritten exception for a debtor's obligations under executory contracts, App. A at 9-10, 15-16. Section 365(g)(1) provides that rejection of an executory contract constitutes a breach of the contract, and section 502(g) provides that any claim ***arising from the rejection*** (*i.e.*, damages arising out of the deemed breach) will be treated as if it had arisen prior to the date when the petition was filed. The Court of Appeals found

it significant that the Bankruptcy Code does not otherwise expressly address the issue of "claims" under executory contracts, and concluded therefore that until rejection executory contracts do not give rise to "claims." App. A at 9-11, 16. In so doing, the Court of Appeals disregarded this Court's admonition that an implied exception to the plain provisions of the Bankruptcy Code should be found only upon satisfying an "exceptionally heavy" burden of persuasion. *Patterson v. Shumate*, 504 U.S. 753, 760 (1992) (quoting *Union Bank v. Wolas*, 502 U.S. 151, 156 (1991)). By themselves, the definitions of "claim" and "debt" include all rights to payment under a contract, whether or not the contract is executory, and regardless of whether the contract is rejected or assumed. Section 365(g)(1) simply gives the creditor ***additional*** rights to payment upon rejection under a deemed anticipatory breach of the contract, and section 502(g) addresses the timing of the claim arising from that deemed breach, treating the claim as pre-petition, rather than as an administrative claim.

The Bankruptcy Code has no express provision for claims existing prior to rejection or assumption, because they are included in the definition of "claim." Nothing in sections 365(g) and 502(g) implies that claims under the contract that arose from the parties' actual conduct under the contract, rather from rejection, should be carved out of the expansive definition of "claim." Moreover, the fact that the Bankruptcy Code does not specifically address claims "arising from the assumption of a contract," which the Court of Appeals found significant, App. A at 16, reflects the simple fact that claims against the debtor do not arise from the assumption of the contract. As noted at

pages 10-12 above, assumption binds the estate to the debtor's obligations under the assumed contract as an administrative expense, but the debtor's obligations and the non-debtor's "claim" against the debtor under the contract exist regardless of assumption. As both its text and its placement in the Bankruptcy Code make clear, section 365 pertains to the administration of the estate,[12] and is not an exception to the definition of "claim" or to the discharge provisions of the Bankruptcy Code. *Cf. Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 560-61 (1990) (holding that the exemption from the administrative automatic stay in 11 U.S.C. § 362(b)(1) for criminal proceedings did not support reading an exception into the definition of "claim" to prevent discharge of criminal restitution obligations).

The Court of Appeals mistakenly invoked case law decided under the old Bankruptcy Act of 1898 to support its ruling that no "claim" exists under an executory contract until rejection. App. A at 17-19 (citing *Federal's, Inc. v. Edmonton Inv. Co.*, 555 F.2d 577 (6th Cir. 1977), and *Consolidated Gas Elec. Light & Power Co. v. United Rys. & Elec. Co.*, 85 F.2d 799 (4th Cir. 1936)). Doing so was a grave methodological error, for this Court has admonished that "[W]here the meaning of the Bankruptcy Code's text is clear . . . its operation is unimpeded by contrary . . . prior practice." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, ___ U.S. ___, 120 S. Ct. 1942, 1949 (2000) (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 546 (1994)). Here, the error is particularly acute

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[12] Section 365 is found in Chapter 3, "Case Administration"; Subchapter IV, "Administrative Powers."

because the Bankruptcy Code was specifically intended to eliminate the issue of "provability" of a claim and to make available the "broadest possible relief" to the debtor,[13] while the Court of Appeals itself continued to state the issue before it in terms of that obsolete concept, App. A at 8 ("Purportedly, Century possessed a provable claim . . . ").[14]

The Court of Appeals also explained its interpolation of an "executory contract" exception into subsections 1141(d) and 101(5) by asserting that applying subsection

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[13] H.R. REP. NO. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266; S. REP. NO. 95-989, at 21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5807-08.

[14] Furthermore, *Federal's* and *Consolidated Gas* do not even stand for the proposition for which the Court of Appeals cited them. *Federal's* held only that lea[illegible]obligations ***arising after confirmation*** of a bankruptcy plan were not "provable" claims subject to discharge. 555 F.2d at 579 n.2 & 581. *Consolidated Gas* involved only the issue of whether damages for breach ***arising out of a rejection*** of an executory contract were "claims" before the rejection occurred. 85 F.2d at 801, 802-03, 804-05. *Consolidated Gas* did not address the status of the debtor's obligation to pay the non-debtor arising out of the non-debtor's pre-confirmation performance under the contract. Thus, when the court in *Consolidated Gas* wrote:

> The party to an executory contract would find it difficult to state a claim under the contract before it had been broken; and certainly neither the debtor nor the trustees could set out the amount of such a claim as required by an order of court directing the filing of schedules in accordance with [the Bankruptcy Act],

id., at 805 (quoted by the Court of Appeals, App. A at 19), it was obviously referring to damages from the breach occasioned by rejection, and not to the right to payment for services provided prior to the rejection.

1141(d)'s discharge to claims under assumed contracts would "nullify[ ]" the cure provision of section 365(b)(1). App. A at 14, 21. Subsection 1141(d), however, grants a discharge "Except as otherwise provided ***in this subsection . . .*** " (emphasis added), and section 365 is not listed in the exclusions in subsection 1141(d). The Bankruptcy Code cannot function properly if courts are free to second-guess Congress and decide for themselves which statute should apply in the case of a conflict between provisions. "Congress 'says in a statute what it means and means in a statute what it says there.' " *Hartford Underwriters*, ___ U.S. at ___, 120 S. Ct. at 1947 (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)), and where the text of the statute is plain, " 'the sole function of the courts . . . is to enforce it according to its terms.' " (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

Furthermore, a discharge would not in fact "nullify" the section 365(b)(1) condition that a contract may be assumed only if the trustee cures defaults under the contract. There can be many situations where a pre-assumption debt is not in "default," because payment is not yet due. Such a debt would not be a "default" capable of being cured, but would nonetheless be a "debt" subject to discharge. Contracts can have delayed payment mechanisms (such as the Wellington Agreement's two-year delay between the "accelerated" payment and the accrual of interest), or call for payment over an extended period, or make payment contingent on future events. A contract can require payment only when demand is made. None

of those situations would be "defaults."[15] Also, many contracts contain latent obligations, such as warranties and indemnities, that do not become manifest and payable (and thus are not in "default") until long after the assumption. *See NCL Corp. v. Lone Star Bldg. Ctrs. (Eastern), Inc.*, 144 B.R. 170, 180 (S.D. Fla. 1992) (holding that indemnity obligation under an assumed lease for pre-assumption pollution caused by tenant was a debt that had been discharged).

Finally, even to the extent of amounts in "default" at the time of assumption, section 365(b)(1) does not suggest an implied exception to discharge. As noted at pages 10-12 above, "assumption" is simply a decision by the trustee to bind the estate administratively by the terms of the assumed contract, rather than "rejecting" it and deeming the contract breached. Even if "cure" becomes an enforceable obligation of the estate (as opposed to being a condition precedent to assumption that can be waived or that would justify rescission of assumption if not performed),[16] that obligation is at most an administrative priority claim. *Cf. Nostas Assocs. v. Costich (In re Klein Sleep Prods.)*, 78 F.3d 18, 24-26 (2d Cir. 1996) (noting

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[15] At least a portion of the INA/Century claim is in this category, because the Wellington Agreement was assumed on March 9, 1993, but Century claims that Section XX interest continued accruing through March 1994.

[16] Rescission of assumption would do Century no good in this case, for if the assumption is invalidated, and the Wellington Agreement rejected as to Century, Century would then even under the Court of Appeals' interpretation have a "claim" that was discharged.

that assumed contract has administrative expense priority). Administrative claims are subject to discharge just like other claims. *In re Benjamin Coal Co.*, 978 F.2d 823, 827 (3d Cir. 1992); LAWRENCE P. KING, ED., COLLIER ON BANKRUPTCY, ¶1141.05, at 1141-17 (15th ed.). There is no reason why any administrative obligation to "cure" a default should be exempt from the discharge that applies to other types of administrative claims.

D. The Misconstruction of the Definition of "Claim" Relating to Executory Contracts Impairs the Proper Administration of the Bankruptcy Code.

The Court of Appeals' approach undermines reorganizations, increases uncertainty of outcome and expense, and jeopardizes the fresh start. Assumption of a contract would bind the post-confirmation reorganized debtor to any number of contingent and unknown liabilities under the contract. An indemnification or warranty obligation pertaining to the debtor's pre-bankruptcy conduct, which ordinarily would be discharged as part of the fresh start, could spring up at any time, in an unlimited amount, if the debtor in possession assumed a contract or lease with such a provision. The non-debtor party to an assumed contract could, like Century/INA in this case, show up years after confirmation of a reorganization plan with a newly asserted interpretation of the assumed contract, claiming amounts relating to pre-confirmation and pre-bankruptcy circumstances that could have been, but never were, asserted in the

bankruptcy.[17] (Notably, Century has further taken the position in this case that the "cure" amounts provided for in a plan are not binding on the non-debtor, so that even those "default" amounts are open for reconsideration after the bankruptcy is concluded.[18])

The risks and uncertainties are borne not only by the debtor itself, but also by its many creditors, which frequently become debt or equity holders in the reorganized debtor as part of the reorganization plan. Although a debtor may simply elect not to assume a contract or lease, that course deprives it and its creditors of potential benefits that the contract might provide. If the debtor assumes the contract, however, the potential for unknown preconfirmation liabilities to emerge years later will necessarily reduce the value of the reorganized debtor, making investment in the reorganized debtor less attractive both

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[17] Although INA received actual notice of the commencement of the National Gypsum bankruptcy case and of the deadline for filing a proof of claim, it never filed a claim. Nor, during the two and one-half year bankruptcy case, did INA notify National Gypsum of the ever-increasing amounts that Century now says were accruing daily during that time.

[18] Century relies on *Orion Pictures Corp. v. Showtime Pictures (In re Orion)*, 4 F.3d 1095, 1099 (2d Cir. 1993), for the proposition that "cure" amounts are merely non-binding estimates having no *res judicata* effect. Although the Court of Appeals in the present case did not reach that issue, App. A at 33, the *Orion* decision and the Court of Appeals' decision in the present case threaten debtors with a pincer, on the one hand denying discharge, and on the other hand denying any reliance on the cure amounts proposed during the bankruptcy case, thereby impairing the fresh start and wasting reorganization efforts.

for creditors considering whether to approve a plan and for post-confirmation investors who could reinvigorate the reorganized company after bankruptcy.

Finally, under the rule announced by the Court of Appeals, a non-debtor party to an executory contract has little incentive to come forward with its claim during the bankruptcy case. Under the rule established by the Court of Appeals, if the trustee assumes the contract, the non-debtor can assert its claim for payment-in-full at leisure (subject only to any statute of limitations) after bankruptcy, when it is too late for the debtor to treat the claim as a pre-confirmation matter subject to the likely *pro rata* treatment provided in the plan. If the trustee rejects the contract, the non-debtor can file a proof of claim, having lost nothing by its delay.[19] Any rule of law that creates an incentive to withhold information in the hope of ambushing others must be viewed skeptically, and where it has no support in the text of the statutes, must be rejected.

The ruling by the Court of Appeals thus operates perversely to delay according "claim" and "creditor" status to the many non-debtors owed money by the debtor under executory contracts and thereby limits their ability to participate in the reorganization process, while at the same time giving those non-debtors an incentive to hold back their claims from the bankruptcy in the hope of possible payment in full of amounts that the debtor and other creditors never expected to face after bankruptcy.

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[19] Because the Court of Appeals holds that no "claim" exists under an executory contract until rejection, the non-debtor would not be bound by the normal bar date requiring creditors to come forward with their claims early in the case.

This Court should settle this important question of federal law before the Court of Appeals' ruling can work mischief in countless bankruptcies in the future.[20]

II. FINALITY OF CONFIRMED PLANS IS IMPAIRED WHERE COURTS IMPOSE NOTICE REQUIREMENTS BEYOND THOSE SPECIFIED BY THE BANKRUPTCY RULES.

The Bankruptcy Court held that as to the portion of INA's claim that was actually in default on the confirmation date, Century/INA was bound by the $0 "cure amount" provided by the plan and confirmation order. The District Court reversed, and the Court of Appeals concluded that a cure amount could bind Century/INA only if INA had received notice of a "specific intent" to assume the Wellington Agreement.

The Court of Appeals stated that the type of notice of assumption required to bind INA to the $0 cure amount is "controlled by the Bankruptcy Code and Rules," App. A at 22, yet never definitively cited an applicable rule or statute. Nonetheless, the Court of Appeals concluded that Century will not be bound by the $0 cure amount unless National Gypsum gave notice of "specific intent" to assume. App. A at 30. Such a requirement has no foundation in the rules or the code.

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[20] Even if other courts sensibly reject the reasoning of the Court of Appeals, the ruling will affect the reliability of bankruptcy proceedings outside the Fifth Circuit, because courts in that circuit will be required to address the effectiveness of discharges granted by bankruptcy courts outside the Fifth Circuit.

The Bankruptcy Rule governing notice and disclosure for reorganization plans is Bankruptcy Rule 3017. It is undisputed that INA received notice of the hearing on the disclosure statement, as required by Bankruptcy Rule 3017(a).[21] Bankruptcy Rule 3017(d) also calls for sending specified solicitation materials for voting on the proposed plan. A creditor who is not on the schedule of creditors, however, must file a proof of claim to be treated as a creditor for purposes of voting, Fed. R. Bankr. P. 3003(c)(2). It is undisputed that although INA had actual notice of the deadline for filing a proof of claim, it did not file one. Moreover, if the Court of Appeals is correct that no "claim" exists prior to rejection, *see* pages 13-15 above, INA was not a "creditor" otherwise entitled to notice. *See* 11 U.S.C. § 101(10) (" 'creditor' means an entity that has a claim against the debtor . . . . ").

Bankruptcy Rule 6006 provides that "a proceeding to assume, reject, or assign an executory contract or lease ***other than as part of a plan*** is governed by Rule 9014" (emphasis added) and requires notice of a motion to do so. The Court of Appeals recognized that the Wellington Agreement was assumed as part of a plan, so that Rule 6006 did not by its terms apply. The Court of Appeals concluded nonetheless that a "reasonable notice" requirement of Bankruptcy Rule 9014 applied, App. A at 25-27, and that "reasonable notice" required notice of "specific intent" to assume, App. A at 30. The Court of Appeals ignored the fact that Bankruptcy Rule 9014 itself applies only to situations "not otherwise governed by these

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[21] S.R. 1239, 1244-47, 1257-63.

rules," and that disclosure of the contents of a reorganization plan *is* governed by a rule; namely, by Bankruptcy Rule 3017.

The Court of Appeals' holding that any plan that includes an assumption or rejection of contracts (*i.e.*, virtually all) is "under the auspices of Rule 9014," App. A at 25, creates significant uncertainty in bankruptcy reorganizations. First, since Bankruptcy Rule 9014 applies expressly to motions, it is not clear how to apply Bankruptcy Rule 9014 to something that is not a motion. Second, courts will soon be called on to decide which parts of Bankruptcy Rule 9014 apply to a plan; for example, must the plan be served "in the manner provided for the service of a summons," and is the full range of discovery available, as Bankruptcy Rule 9014 provides?[22]

Imposing requirements beyond those called for under Bankruptcy Rule 3017 would have significant effects in the administration of bankruptcy cases throughout the country, leading either to uncertainty about the legal effectiveness of acts or to additional layers of notices, procedures, and litigation over procedures. The interpretation violates the requirement of Bankruptcy Rule 1001 that "These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." If the notice requirements of the Bankruptcy Rules are insufficient, the gap should be filled by the Rules Committee, or by reference to fundamental concepts of due process, and not by stretching or

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[22] Bankruptcy Rule 9014 provides, among other things, that Bankruptcy Rules 7026 and 7028-37 apply. Those rules incorporate by reference Federal Rules of Civil Procedure 26 and 28 through 37.

misapplying the rules to cover situations that the rules expressly do not address.

Furthermore, the Panel Opinion concludes that if the notice of "specific intent" to assume was not given, the $0 cure amount would automatically not be binding on Century/INA. App. A at 30, 33. That blanket ruling violates Bankruptcy Rule 9005, which incorporates Federal Rule of Civil Procedure 61. Rule 61 provides that

> No error . . . in anything done or omitted by . . . any of the parties . . . is ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceedings ***must*** disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. (emphasis added)

Similarly, 28 U.S.C. § 2111 requires the courts of appeals to disregard "errors or defaults which do not affect the substantial rights of the parties." *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) ("The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of [the proceeding].") The Court of Appeals disregarded the mandate to consider harmless error, and instead pronounced a rule that any error in notice will deprive the judgment of *res judicata* effect.

Moreover, even if the Bankruptcy Rules required a specific form of notice and such notice was not given, the

Court of Appeals cited no authority for its conclusion that the Bankruptcy Court's confirmation order should automatically be denied *res judicata* effect with respect to cure amounts. To the contrary, the touchstone for whether a judgment will have *res judicata* effect is whether the party sought to be bound had a "full and fair" opportunity to be heard. *Blonder-Tongue Lab., Inc. v. University of Illinois Found.*, 402 U.S. 313, 328, 329 (1971). *Cf. Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982) (state proceeding will be given *res judicata* effect so long as constitutional due process was satisfied). The Court of Appeals' holding that failure to satisfy technical notice requirements will preclude giving *res judicata* effect to a federal court judgment, without regard to whether the notice actually given satisfied due process standards or provided a "full and fair" opportunity to be heard, is a significant limitation on the effectiveness of federal judgments rendered not only by courts in the Fifth Circuit, but also by federal courts elsewhere, insofar as a party might seek enforcement within the Fifth Circuit.

Accordingly, both the untenable interpretation given to the Bankruptcy Rules by the Court of Appeals, and that court's insistence on rigorous compliance with that novel interpretation, present important issues of federal law suitable for resolution by this Court.

Respectfully submitted,

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June 29, 2000

In the Matter of NATIONAL GYPSUM COMPANY, Debtor.
Century Indemnity Co.; Insurance Company of North America, Appellees,

v.

National Gypsum Company Settlement Trust; Asbestos Claims Management Corporation, Appellants.

No. 98-11116.

United States Court of Appeals,
Fifth Circuit.

March 31, 2000.

Appeal from the United States District Court
For the Northern District of Texas.

Before EMILIO M. GARZA and PARKER, Circuit Judges; and FITZWATER, District Judge.[1]

ROBERT M. PARKER, Circuit Judge:

Appellants,[2] a reorganized Chapter 11 Bankruptcy debtor, filed suit seeking a declaratory judgment that

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[1] District Judge for the Northern District of Texas, sitting by designation.

[2] Throughout this opinion, the court will refer to the appellants collectively as National Gypsum Company ("National Gypsum"). National Gypsum is a reorganized Chapter 11 debtor. Under its plan of reorganization, most operating assets were conveyed to the New NGC, which assumed the name "National Gypsum Company," and the debtor National Gypsum changed its name to Asbestos Claims Management Corporation ("ACMC"). ACMC, which owns the rights under National Gypsum's insurance policies, became a subsidiary of the NGC Settlement Trust, created under the plan

appellee's claim stemming from an assumed contract was discharged in the debtor's earlier bankruptcy proceedings. At summary judgment, the bankruptcy court determined that the claim was not discharged, but that the contract was assumed with a binding $0 cure amount. Both parties appealed. The district court, sitting as an appellate court, affirmed the discharge ruling but reversed as to the binding nature of the cure amount. The reorganized debtor appeals that ruling.[3] We AFFIRM.

I. FACTS AND PROCEDURAL HISTORY

A. Background

1. The Wellington Agreement

National Gypsum Company ("National Gypsum") was a manufacturer of asbestos-containing products, while Insurance Company of North America ("INA") was one of its insurers, having issued liability insurance policies to National Gypsum in the 1950s. Beginning in the 1970s, National Gypsum was sued for bodily injury and

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to provide payments to holders of asbestos-related claims against National Gypsum. Accordingly, NGC Settlement Trust and Asbestos Claims Management Corp. are the named appellants in this appeal.

[3] In addition to Plaintiffs/Appellants' substantive appeal, we have before us a pending motion – Defendant/Appellee's Motion to Determine Appellate Jurisdiction. Defendant/Appellee contends that jurisdiction is proper; in their response, Plaintiffs/Appellants concur. Upon due consideration of the parties' filings, the record of the proceedings below, and the applicable law, we agree. JURISDICTION CONFIRMED.

property damage claims arising from the asbestos-containing products it sold. An insurance coverage dispute soon followed mirroring the litigation taking place throughout the country between other former asbestos manufacturers and their insurers.

A large part of this industry-wide litigation was ended when a number of parties reached a negotiated settlement, commonly referred to as the Wellington Agreement. This accord, signed in 1985 by numerous manufacturers and their insurers – including National Gypsum and INA – resolved persistent contribution and indemnity issues, thereby allowing for joint representation in thousands of pending asbestos-related lawsuits. The Wellington Agreement provided for the creation of the Asbestos Claims Facility to analyze, defend, and settle pending and future asbestos-related bodily injury claims referred to it by participating former asbestos producers. Under the agreement, funding for the payment of settlements, judgments, and legal expenses incurred in the defense of asbestos-related bodily injury claims against the party-producers was provided by the party-insurers.

But not all insurers signed the agreement, causing gaps in coverage to arise where non-signatory insurer payments were called for. Under the Wellington Agreement, party-insurers agreed to make gap-filling payments to cover the non-signatory insurers' share of defense and indemnity costs. It was recognized that this would cause the insurers to pay out their policy limits more quickly than they would if the non-signatory insurers were participating. In response, Section XX of the Wellington Agreement was designed to compensate signatory

insurers for these interim payments. Under Section XX, producers are required to use their best efforts to obtain coverage from non-signatory insurers. To encourage producers to pursue non-signatory insurers, interest on gap-filler payments begins to accrue two years after payment is made. The producer must thereafter pay interest quarterly until the earlier of (a) a settlement with or final judicial determination against the non-signatory insurer, or (b) the date on which the signatory insurer would have exhausted its policy limits if the non-signatory insurer had been a participating party to the Wellington Agreement.

Some of National Gypsum's insurers did not sign the Wellington Agreement, thus INA's successor in interest, Century Indemnity Company ("Century"), allegedly made gap-filling payments on behalf of National Gypsum for amounts owed by non-signatory insurers from October 1987 through May 1990. According to Century, Section XX interest accrued on the amount due to Century through March 1994, and prejudgment interest continues to accrue. Century claims that National Gypsum has never paid any portion of the now more than five million dollars owed to Century.

2. The Reorganization of National Gypsum

National Gypsum filed a Chapter 11 bankruptcy petition October 28, 1990. As a part of its reorganization plan, National Gypsum sought to assume the Wellington Agreement, one of approximately 250 executory contracts or unexpired leases to which National Gypsum was a party. In accordance with Bankruptcy Code requirements,

the National Gypsum plan detailed the cost to "cure" any existing defaults on these executory contracts or unexpired leases. National Gypsum's plan represented that the company was not in default on any payments under the Wellington Agreement, and therefore, the cost to cure all defaults was $0.

On March 9, 1993, the bankruptcy court entered its "Order Confirming the First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc." confirming the National Gypsum plan of reorganization.

B. Procedural History

In October 1995, following attempts by Century to recover the amounts allegedly due, National Gypsum brought suit in the Bankruptcy Court for the Northern District of Texas seeking a declaration that its contract obligations to Century were discharged in the earlier Chapter 11 reorganization. Following discovery, National Gypsum moved for summary judgment claiming that any amounts previously due were discharged, pursuant to 11 U.S.C. § 1141(d) (1994), for $0 because Century failed to file timely proof of its claim, despite having sufficient notice of the pendency of the bankruptcy to protect its interests, and that the bankruptcy court's confirmation order precluded re-litigation of this issue. After a hearing, the bankruptcy court granted summary judgment in favor of National Gypsum finding that Century was provided sufficient notice to be bound by the confirmation order which discharged Century's claims.

Century then moved the court to set aside the judgment and re-examine both issues. Ultimately, the bankruptcy court determined that confirmation of the plan did not discharge Century's right to payment under the Wellington Agreement, but that Century was precluded by *res judicata* from asserting that any amount other than $0 was due. The court reached this conclusion despite having found that there was a factual dispute as to whether Century had received the court-ordered notices that would have alerted it to the fact that the Wellington Agreement was being assumed with a $0 cure amount. In essence, the bankruptcy court determined that this factual question was immaterial, because mere knowledge of the pendency of the bankruptcy action was sufficient in and of itself to bind Century.

Both parties appealed to the District Court for the Northern District of Texas. The district court ruled in Century's favor on all three issues – discharge of the claim, sufficiency of the notice, and *res judicata* effect of the confirmation. The district court affirmed the bankruptcy court's holding that Century's right to payment was not discharged, reasoning that the discharge provision of § 1141(d) could not be so inflated as to wipe out the requirements of 11 U.S.C. § 365 (1994) (the section of the Bankruptcy Code that governs executory contracts and unexpired leases) that all executory contracts be brought current as a condition of their assumption.

The district court reversed the bankruptcy court on the notice issue, holding instead that the debtor had a responsibility to assure that the non-debtor party was on notice of the debtor's specific intent to assume the contract. The court then demonstrated that National Gypsum

was unable to meet this standard based on the summary judgment record for two reasons. First, there existed a fact question whether Century was sent copies of crucial notices and mailings that the bankruptcy court had ordered to be sent to all affected parties. Specifically, did Century receive either the plan or the notice enumerating which executory contracts National Gypsum intended to assume, either one of which would have alerted Century that the Wellington Agreement was being assumed with a $0 cure amount? Second, the summary judgment proof demonstrated only that a representative of Century knew of the commencement of National Gypsum's Chapter 11 reorganization, not of the specific intent to assume. Consequently, the district court found that Century's due process rights had been violated.

Finally, the district court held that the confirmation order was not *res judicata* as to the cure amount, because the bankruptcy court "unambiguously anticipated disputes regarding cure amounts and retained jurisdiction to hear them." National Gypsum took an appeal from the district court's judgment, placing all three issues before us today.

II. DISCUSSION

A. Standard of Review

Bankruptcy court rulings and decisions are reviewed by a court of appeals under the same standards employed by the district court hearing the appeal from bankruptcy court; conclusions of law are reviewed *de novo*, findings of fact are reviewed for clear error, and mixed questions of fact and law are reviewed *de novo*. *See Traina v. Whitney*

National Bank, 109 F.3d 244, 246 (5th Cir. 1997). We review a grant of summary judgment *de novo*. *See Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850, 853 (5th Cir. 1996).

B. Century's Claims Were Not Discharged

1. Contentions of the Parties

National Gypsum argues that Century is barred from recovery because Century failed to take the necessary steps to protect its claim prior to confirmation of National Gypsum's reorganization plan. Purportedly, Century possessed a provable claim, because it was owed Section XX reimbursement payments prior to the reorganization. Under this theory, Century erred by failing to file a proof of its claim prior to the bar date, as a result, the claim was discharged along with all other unproven pre-confirmation debts by operation of the general discharge provision of Bankruptcy Code § 1141(d). National Gypsum's argument rests on a belief that an amount due in default on an assumed executory contract is subject to the claims discharge provisions of § 1141(d), and thereby removed from the cure provisions of § 365 that require prompt compensation for any default. Both the bankruptcy court and the district court were correct to reject this argument.

2. Bankruptcy Code Sections 1141(d) and 365

Section § 1141(d) binds some creditors to the terms of the confirmed reorganization plan while discharging all others. See 11 U.S.C. § 1141(d)(1)(A) (1994) ("Except as otherwise provided for in the plan or the order confirming the plan, the confirmation of a plan . . . discharges the

debtor from any debt that arose before the date of such confirmation."). Section 1141(d) also enumerates different types of "claims" that are excepted from discharge. See § 1141(d) (the debtor is discharged from any debt "[e]xcept as otherwise provided for in this subsection"). Although National Gypsum correctly points out that the list of exceptions is exclusive and makes no reference to § 365, it is incorrect to extrapolate from this that a default amount owed on an executory contract is always a "claim" within the ambit of § 1141(d).

The Bankruptcy Code provides special rules for the treatment of executory contracts and unexpired leases during a Chapter 11 reorganization. See 11 U.S.C. § 365 (1994). In general, section 365 allows "the trustee, subject to the court's approval, [to] assume or reject any executory contract or unexpired lease of the debtor." Id. Under § 365, a debtor may elect one of two options when assessing how to treat an executory contract or unexpired lease to which it is a party; the contract or lease may either be rejected or assumed.[4]

"[T]he authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). The Bankruptcy Code provides that the effect

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[4] If an executory contract is neither assumed nor rejected, it will "ride through" the proceedings and be binding on the debtor even after a discharge is granted, thus allowing the non-debtor's claim to survive the bankruptcy. *See Federal's, Inc. v. Edmonton Inv. Co.*, 555 F.2d 577, 579 (6th Cir. 1977).

of a rejection of an executory contract is a breach, see 11 U.S.C. § 365(g) (1994), and the breach gives rise to a claim for damages by the non-debtor party to the contract. *See Wainer v. A.J. Equities, Ltd.*, 984 F.2d 679, 684 (5th Cir. 1993); *see also Bildisco*, 465 U.S. at 518. The "claim" created by the rejection of the contract or lease is then afforded treatment similar to all other unsecured claims that are either provided for in the plan or are discharged through § 1141(d). The non-debtor whose lease or contract is rejected is then afforded the opportunity, *subsequent to the debtor's decision on how to treat the contract or lease*, to protect its interests by filing a proof of "claim" after which the non-debtor is treated as an unsecured creditor. *See In re Parkwood Realty Corp.*, 157 B.R. 687, 690 (W.D. Wash. 1993). ("[The Code] clearly contemplate[s] that a party to an executory contract will receive notice of rejection when it receives a copy of the Disclosure Statement and Plan, giving it a window in which to file a proof of claim for damages."); see also LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY § 365.09[1] (15th ed. 1999) (hereinafter "COLLIER ON BANKRUPTCY").[5]

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[5] The debtor may delay making a decision and simply provide for assumption or rejection in the plan itself. "This is often a useful means for the debtor to avoid binding itself to contracts or leases before it has formulated a feasible business plan under which it knows whether it will want the benefits and burdens of each agreement." COLLIER ON BANKRUPTCY § 365.04[2][a]. In sum, the Bankruptcy Code sets forth a scheme in which the debtor maintains almost exclusive control over the timing of its decision on assumption or rejection to ensure that its decision contributes to a workable plan of reorganization. In turn, the non-debtor party is then afforded time to take steps to protect its interest after the debtor has determined the status of the contract.

The non-debtor, former contractual partner only becomes an unsecured creditor after rejection. Therefore, the non-debtor is not required to have filed a proof of claim prior to the claims bar date, a date that in all likelihood preceded the debtor's decision to reject the contract or lease.[6]

Rather than reject the contract or lease, the debtor may choose to assume it. An assumed lease or contract will remain in effect through and then after the completion of the reorganization. The non-debtor party to the agreement is not released from its duties and must continue to perform; likewise, the debtor must continue to perform or pay for the services or other costs that are not discharged. "[T]he act of assumption must be grounded, at least in part, in the conclusion that maintenance of the contract is more beneficial to the estate than doing without the other party's services." *MMR Holding Corp. v. C &*

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[6] It should be noted that adoption of National Gypsum's contrary analysis would have a perverse effect outside the scope of this case, an effect that would be felt by non-debtor parties whose contracts or leases are rejected. Contrary to the explicit statements of the Code, the act of rejection would only create a bona fide claim for damages if the non-debtor had already filed a preemptive, conjectural proof of claim earlier in the bankruptcy proceedings. The decision to assume or reject would cease to be the determining factor as to whether the debtor had a claim; instead it would be the non-debtor's filing of a proof of claim that would be dispositive. This scheme – unappealing from a policy perspective as it would result in a deluge of potentially pointless preemptive proofs of claims – is inconsistent with the Bankruptcy Code's more prudent approach, which is to simply permit those non-debtors whose contracts or leases were rejected to react to the debtor's decision.

C Consultants, Inc. (In re MMR Holding Corp.), 203 B.R. 605, 612 (Bankr. M.D. La. 1996); *see In re Eagle Bus Mfg., Inc.*, 148 B.R. 481, 483 (Bankr. S.D. Tex. 1992). Since not all contracts are zero-sum bargains, the contract will not necessarily be a detriment to the other party. Nevertheless, it is the debtor who decides whether to maintain the contract, and this authority vests the debtor with a considerable amount of power:

> Section 365 is intended to provide a means whereby a debtor can force another party to an executory contract to continue to perform under the contract if (1) the debtor can provide adequate assurance that it, too, will continue to perform, and if (2) the debtor can cure any defaults in its past performance. The provision provides a means whereby a debtor can force others to continue to do business with it when the bankruptcy filing might otherwise make them reluctant to do so. The section thus serves the purpose of making the debtor's rehabilitation more likely.

Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1310 (5th Cir. 1985); *see* RICHARD I. AARON, BANKRUPTCY LAW FUNDAMENTALS, § 9.04[3] (1999) ("The power to reject unfavorable contracts is a potent weapon in the arsenal of unique bankruptcy powers.").

Not surprisingly, the Bankruptcy Code affords the non-debtor a measure of protection, since it is possible that the contract is not beneficial to the non-debtor, and the non-debtor lacks any decision-making authority in

the assumption process.[7] Section 365 "allows a debtor to 'continue in a beneficial contract provided, however, that the other party is made whole at the time of the debtor's assumption of said contract.' " *Eagle Bus*, 148 B.R. at 483 (quoting *In re J.W. Mays*, 30 B.R. 769, 772 (Bankr. S.D.N.Y. 1983)). This cure requirement is set forth in § 365(b)(1):

> If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365.

Thus, the debtor party must take full account of the cost to cure all existing defaults owed to the non-debtor party when assessing whether the contract is beneficial to the estate. *See Three Sisters Partners, L.L.C. v. Harden (In re*

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[7] The non-debtor may by motion to the court seek to have a deadline imposed on the debtor's assumption decision, but other than this limited ability to prompt a decision, the non-debtor is without power over the assumption process. *See* § 365(d)(2); COLLIER ON BANKRUPTCY § 365.04 [2] [b].

Shangra La, Inc.), 167 F.3d 843, 849 (4th Cir. 1999); *MMR Holding*, 203 B.R. at 613 ("Assumption presumes curing all prepetition default. . . . ").

A non-debtor is further protected by the requirement that an executory contract may not be assumed in part and rejected in part. *See* COLLIER ON BANKRUPTCY § 365.03[1]. Where the debtor assumes an executory contract, it must assume the entire contract, *cum onere* – the debtor accepts both the obligations and the benefits of the executory contract. *See Bildisco*, 465 U.S. at 531. Although this rule can have broader application, in the instant case this condition serves only to reinforce the cure requirement of § 365(b)(1). *See Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 798 (4th Cir. 1998) ("That the obligations of an executory contract be accepted along with its benefits is made plain by the Bankruptcy Code's requirement that, as conditions of the contract's assumption, the debtor cure any existing default and compensate all non-debtor parties for actual pecuniary losses that have resulted therefrom.").

National Gypsum asks us to find that § 1141(d)(1) can be read to provide for discharge of amounts in default under assumed executory contracts, thereby nullifying the cure requirement of section 365(b)(1). The bankruptcy and district courts, citing our opinion in *Wainer v. A.J. Equities, Ltd.*, 984 F.2d 679 (5th Cir. 1993), held that the discharge power of § 1141(d) does not reach out to extinguish the need to cure existing default on executory contracts that are assumed by the reorganized debtor. We agree.

3. The Wainer Decision

In *Wainer*, the lessor consented to release an existing tenant and allow the assumption and assignment of the lease to a new tenant. Subsequently, the lessor filed suit against the debtor's guarantor after the lease assignee filed bankruptcy and rejected the lease. We ruled that the lessor had novated the lease by consenting to the assumption and assignment, thereby waiving its right to require a guarantee of the assignee's obligations. 984 F.2d at 685. Thus, a landlord, who would otherwise be free to pursue a guarantor if the lease is rejected, cannot pursue a guarantor if the lease is assumed. This stems from the fact that, in accordance with § 365(b), the lease is brought back into compliance with its terms, and the other party to the lease is compensated for any interim pecuniary loss. *See* COLLIER ON BANKRUPTCY § 365.05 [3]. The end result is that there is no default to prompt liability against the guarantor.

Although our analysis in *Wainer* continued on from this point to determine the validity of the novation, it is only the Court's treatment of § 365 that is of relevance to the case at bar. In this key portion of our discussion, we noted the only instance in which the Bankruptcy Code speaks of a claim arising from an unexpired lease or executory contract – when the contract or lease has been rejected:

> *A claim arising from the rejection,* under section 365 of this title . . . of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b) or (c) of this

> section or disallowed under subsection (d) or (e) of this section. . . .

Wainer, 984 F.2d at 684 (quoting 11 U.S.C. § 502(g) (1994) (discussing post-petition debts)) (emphasis added.). In addition, we noted that section 365(g) explains that the rejection of an unexpired lease constitutes a breach of the lease, giving rise to a claim. *See* 11 U.S.C. § 365(g) (1994).

In light of the absence of any reference to a claim arising from the assumption of a contract and the express cure provisions for dealing with existing defaults, we concluded that "under the Bankruptcy Code, a lease that has been *assumed* under a plan or pursuant to section 365 does not give rise to a claim." *Wainer*, 984 F.2d at 684 (emphasis in original). The fact that the lease in question was both assumed and assigned was not dispositive to our conclusion on the discharge issue. *See id.* at 684-85 ("[the debtor] did not reject the Lease and, thus, no claim arose in its bankruptcy proceedings to bring about a debt which may have been discharged.").

Despite these plain statements, National Gypsum points to a single sentence in which we stated "[w]hen a lease is assumed and assigned to a third party pursuant to section 365 . . . it does not discharge a debt." *Id.* at 684. This is a correct statement of our conclusion in that case in which the lease at issue was assumed *and assigned*. There was no emphasis placed on "assigned" in this lone sentence from which to conclude that the assignment was critical to the "no discharge" conclusion. In sum, the court affirmed that a claim arises only from the rejection

of an unexpired lease or executory contract, not from the assumption of such a lease or contract.[8]

If the language we employed in *Wainer* was inexact, even a cursory examination of the supporting case citations and subsequent case law dispels any confusion over the issue. In *Wainer*, we made favorable reference to *Federal's, Inc. v. Edmonton Inv. Co.*, 555 F.2d 577, 581 (6th Cir. 1977). In *Edmonton*, also a case dealing with an assumption and assignment scenario, our sister court explained that a default does not give rise to a dischargeable claim:

> [There are] two specific events that may give rise to a provable claim under the lease, even though the lease was not rejected. These events are an automatic termination of the lease or an actual breach and subsequent termination by the landlord, occurring either contemporaneously with or prior to the commencement of the proceedings. Neither of those events occurred in the present case. Thus, *the default of the assignee alone did not give Edmonton a provable claim against Federal's*, and such default failed to alter

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[8] This determination is not a new one to this court as we discussed the issue tangentially in the context of a discussion on voting rights under Chapter 11. *See Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1281 (5th Cir. 1991) ("A party to a lease is considered a 'creditor' . . . only when the party has a claim against the estate that arises from rejection of a lease. If, however, the debtor expressly assumes a lease, the lessee has no 'claim' against the debtor. . . . ").

> the character of the executory contract between Edmonton and Federal's.

555 F.2d at 581 (emphasis added) (footnote omitted).

Similarly in *In re Marble Publ'g Co.*, 20 B.R. 933, 935 (Bankr. E.D. Pa. 1982), the bankruptcy court denied a complaint seeking an order compelling the debtor to cure an existing default on a lease by payment of pre-petition rent. In explaining the effects of assumption under § 365, the Court explained:

> . . . if an unexpired lease is assumed by a debtor in possession under the Code, and such action is approved by the court, such assumption creates a new administrative obligation of the estate which is payable as a first priority. . . . Equally important is the fact that *such assumed obligation is a postpetition debt that is not discharged by a confirmation of a chapter 11 case, and it therefore continues to be an obligation of the reorganized debtor.*

Marble Publ'g, 20 B.R. at 934 (emphasis added) (footnote omitted).

National Gypsum's argument that the "no discharge" conclusion in *Wainer* hinged upon the assignment of the lease is unpersuasive; it is unsupported by the plain language of the Bankruptcy Code and circuit precedent. In addition, National Gypsum's position is contrary to other supporting authority not cited in our earlier opinion. Specifically, our conclusion today is in accord with that reached by the Fourth Circuit. In the seminal case *Consolidated Gas Elec. Light & Power Co. v. United Ry. & Elec. Co.*, 85 F.2d 799 (4th Cir. 1936), our sister court addressed the issue of whether an executory contract,

neither assumed nor rejected, remains enforceable. The Fourth Circuit rebuffed the argument that a party to an un-rejected executory contract had a definite interest and, consequently, had a claim against the debtor, occupying the role of a creditor with all its attendant duties. *See Consolidated Gas*, 85 F.2d at 804. Instead, the court held that a claim under an executory contract does not arise within the meaning of the Bankruptcy Act until the contract has been rejected. *See id.* The court reasoned:

> The party to an executory contract would find it difficult to state a claim under the contract before it had been broken; and certainly neither the debtor nor the trustee could set out the amount of such a claim as required by an order of court directing the filing of schedules . . . and the holder of a contract would have a like difficulty in complying with the customary order of the judge with reference to the filing of claims by creditors[.]

Consolidated Gas, 85 F.2d at 805; *see also Hotz v. Fed. Reserve Bank of Kansas City*, 108 F.2d 216, 219 (8th Cir. 1939); *In re DeVlieg, Inc.*, No. 93-C-20104, 1993 WL 248205, at *2 (N.D.Ill. July 6, 1993).

Finally, it should be noted that implementation of National Gypsum's theory would strip § 365(g) of any operational effect by eviscerating the protections it offers non-debtor parties. In this case, National Gypsum attempts to turn what is a shield for the non-debtor party into a sword for the debtor. This is not the intent of the Bankruptcy Code. The contention that a pre-confirmation claim, subject to discharge, was created by arrearage on the contract is incompatible with the language of § 365 which specifically contemplates such instances when it

requires the debtor to cure any default. Section 365(b)(1) provides a guarantee to the non-debtor party, who may be forced to continue a relationship it would rather terminate, that as condition to the forced continuation of the contractual relationship, any losses or defaults existing at the time will be satisfied either through a timely cure or through reasonable assurances of future payment. National Gypsum would undermine this protection by imposing an extra-statutory requirement: that the right to cure must be preemptively protected by the filing of a proof of claim. Failure to make a timely filing of this theoretical claim would preclude the non-debtor from recovery on the amounts owed. In effect, contracts that would otherwise not be beneficial to the estate could become beneficial once the detrimental side of the ledger was wiped clean. This runs contrary to the Code's treatment of non-debtor parties to assumed contracts in which it acknowledges their unusual predicament and accordingly provides protections not offered to ordinary creditors subject to § 1141(d) discharge.[9]

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[9] National Gypsum also argues that the rejection of inquiry notice standard will prompt non-debtor parties to executory contracts to sit on their rights and wait to come forward only after the contract has been assumed. Purportedly, this "lie in wait" strategy would allow the non-debtor to avoid receiving only "the normal 'cents-on-the-dollar' distribution accorded to other creditors." The non-debtor would come forward post-confirmation and assert a claim for the full cure amount.

In the context of assumption of executory contracts, there is far less to fear in the way of non-debtors waiting out the process, than there is of creditors waiting out the discharge of unsecured debts. Non-debtor parties to executory contracts must be made whole as part of the assumption; there is no point in waiting because there will be no "cents-on-the-dollar" distribution.

The powers of the debtor in the assumption of contract arena should not be so needlessly aggrandized. Accordingly, we hold that § 1141(d) cannot be read to provide for discharge of amounts in default under assumed contracts in a manner that would nullify the cure requirement of section 365(b)(1).

C. Notice

1. The Contentions of the Parties

Our "no discharge" conclusion necessitates consideration of the lower courts' split on the issue of notice. The question remains whether, due to inadequate notice, Century was deprived of its ability to take reasonable measures to protect itself from having the executory contract to which it was a party assumed with a $0 cure amount.

The bankruptcy court recognized that there was a fact question as to the formal notice received by Century. The court reasoned that the same standard of notice applicable to unsecured creditors – mere knowledge of the pendency of the reorganization – applied with equal force to non-debtor parties to executory contracts. Accordingly, the insufficiency of formal (or sufficiently

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Actually, the risk runs in the opposite direction: it is far more likely that a reduced standard of notice would encourage debtors to be careless in determining, or to intentionally understate, cure amounts, then fail to provide ordered adequate formal notice in order to avoid payment on contractual sums owed. According to Century, this is exactly what occurred in this case, where little internal scrutiny was given to the setting of the cure amount by National Gypsum.

particularized actual) notice was not thought to be dispositive in this case, because the summary judgment record reflected that a representative of Century was aware of the commencement of the National Gypsum reorganization. The district court reversed, concluding that formal notice was necessary, and that the fact question as to formal notice would have to be resolved by the bankruptcy court on remand. In essence, the lower courts agreed that unsecured creditors and non-debtor parties to executory contracts in default are treated differently under the substantive Code sections governing discharge and assumption, but the courts disagreed as to whether the distinction was carried over into the procedural Code sections governing discharge and assumption.

National Gypsum contends that the bankruptcy court was correct to dispose of this issue on constitutional due process grounds pursuant to *Sequa Corp. v. Christopher (Matter of Christopher)*, 28 F.3d 512 (5th Cir. 1994), rather than on statutory grounds pursuant to § 365 and Bankruptcy Rule 6006. Based on this analysis, National Gypsum concludes that Century is barred from recovery even though a fact question remains concerning whether Century received the formal notice ordered by the court. We conclude that the district court correctly rejected this analysis, because the result is controlled by the Bankruptcy Code and Rules, obviating the need to ascertain how constitutional due process considerations would fill the perceived statutory lacuna. Even if there was a gap to fill, the constitutional due process standard set forth in

Christopher has never been extended to apply to assumption of executory contracts.[10]

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[10] In *Christopher*, the debtor filed suit seeking a declaratory judgment that post-petition claims made against him were discharged through confirmation of his plan of reorganization. 28 F.3d at 514. The creditors' claims arose out of the debtor's breach of contract for the acquisition of a subsidiary corporation. During the negotiations of the deal, the creditors were "made aware" of the debtor's prior petition for Chapter 11 relief. *Id.* at 513-14. Since the claims arose post-petition, the creditors were not required to be listed. They were not listed as creditors and did not participate in any of the bankruptcy proceedings. The bankruptcy court concluded that the creditors were deprived of due process with respect to their unsecured claims, and therefore, they were not bound by the terms of the confirmed reorganization plan. On appeal, we determined first that the matter was not controlled by the statutory provisions of the Code. Second, we addressed the constitutional requirements of due process, in the context of unsecured creditors' claims, expanding on our earlier holding in *Grossie v. Sam (Matter of Sam)*, 894 F.2d 778 (5th Cir. 1990). In *Sam*, we held that "all constitutional due process requires . . . is that [the creditor] have 'notice reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections.' " *Id.* at 781 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Applying the standard from *Sam*, the *Christopher* panel concluded that "it does not offend due process to view actual notice of a debtor's bankruptcy to a [prepetition] creditor as placing a burden on the creditor to come forward with his claim." *Matter of Christopher*, 28 F.3d at 517 (stating that as to claims "due process requires only notice that is both adequate to apprise a party of the pendency of an action affecting its rights and timely enough to allow the party to present its objections."). No Fifth Circuit case subsequent to *Christopher* and *Sam* has extended the due process standard from the discharge of debts to cure amounts of assumed contracts.

2. The Governing Statutory and Rule Provisions

"As a general matter, a party seeking relief in bankruptcy court is not entitled to achieve a *fait accompli* with respect to the protectable interests of parties who did not receive notice prior to any loss with respect to their interest." 7 COLLIER ON BANKRUPTCY § 1109.06[2]. In furtherance of this end, the Bankruptcy Code is replete with provisions requiring proper notice to all parties affected by the proceedings. *See, e.g.*, BANKR.RULE 6006. The notice question presented by this case arises, in part, because of the peculiar wording of Rule 6006.

The district court based its conclusion on notice largely upon the closely analogous case of *Republic Health Corp. v. Coral Gables, Ltd. (In re REPH Acquisition Co.)*, 134 B.R. 194 (N.D. Tex. 1991). In *REPH*, the district court decided a bankruptcy appeal involving an order denying a motion to assume an unexpired lease. 134 B.R. at 195. The court affirmed the denial of the motion to assume. *Id.* at 202. In so doing, the court rejected the Chapter 11 debtor's assertion that general notice of the existence of a plan of reorganization provided sufficient notice of the debtor's intent to assume the unexpired lease as part of the plan. *Id.* at 199. Instead, the court held that the debtor had responsibility to assure that the lessee was on notice of the debtor's specific intent to assume the lease. *See id.* The court based its conclusion upon its reading of Bankruptcy Rule 6006 which provides:

> Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease
>
> (a) Proceeding to assume, reject, or assign
>
> A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014.
>
> * * *
>
> (c) Notice
>
> Notice of a motion made pursuant to subdivision (a) or (b) of this rule shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, . . . to the United States trustee.

BANKR.RULE 6006.

As other courts have noted, the setting of cure amounts is "not otherwise governed by" the Bankruptcy Rules, and thus falls under the auspices of Rule 9014. *See, e.g., In re O'Brien Envtl. Energy, Inc.*, 188 F.3d 116, 123 (3rd Cir. 1999). Bankruptcy Rule 9014 states, in pertinent part:

> In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought.

BANKR.RULE 9014.

National Gypsum takes the position that the "other than as part of a plan" language absolves the reorganizing debtor of responsibility to provide notice of its intent to either reject or assume the contract or lease. Once the non-debtor party to the contract or lease can be deemed

aware that the reorganization has been filed, the onus is on the non-debtor contractual partner to follow the progress of the bankruptcy proceedings. The *REPH* court determined that Congress in fact adopted the contrary approach.

> Rule 6006(a) excuses the procedure that applies in contested matters when a proceeding to assume an unexpired lease is "part of a plan." *Fairly interpreted, Rule 6006(a) does not eliminate the notice requirements applicable to a contested matter.* Rule 9014, which governs contested matters not otherwise covered by the Bankruptcy Rules, requires that relief be requested on reasonable notice to the party against whom the relief is sought. The court holds that Rule 6006(a) implies a similar obligation upon a debtor who seeks to assume an unexpired nonresidential lease by means of its proposed reorganization plan. *This means that although the plan itself constitutes the act of assumption contemplated by § 365(d)(4), the lessor, as the party against whom the relief is sought, must be given reasonable notice of the debtor's intent.* Even if Rule 6006(a) cannot be read to incorporate the notice requirement of Rule 9014, § 1125(b) of the Code plainly requires that the contents of a proposed reorganization plan be adequately disclosed.

REPH, 134 B.R. at 199 (emphasis added) (footnote omitted). In sum, the phrase "other than as part of a plan" was intended only to obviate the need to file a separate motion expressing the intent to assume or reject. Rule 6006 was not intended to establish a two-tier standard of

notice in which formal notice is required if the assumption is to be by motion, but if assumption is to be by plan, the responsibilities of the debtor are radically diminished.

The vast majority of the cases addressing the level of notice required involve situations in which the debtor expressed its intent to assume by motion to the court. There is a paucity of cases in which sufficiency of notice is considered when the debtor expressed its intent to assume only in its proposed plan of reorganization. In cases where intent to assume is revealed by motion, courts require strict adherence to the requirements of § 365 and Rules 6006 and 9014 out of "concern with protecting unknowing [contractual partners] from the consequences of an assumption of which they had no notice and which [they] had no opportunity to contest." *Elliot v. Four Seasons Properties (In re Frontier Properties, Inc.)*, 979 F.2d 1358, 1365 (9th Cir. 1992); *see also South Street Seaport Ltd. Partnership v. Burger Boys, Inc. (In re Burger Boys, Inc.)*, 94 F.3d 755, 763 (2d Cir. 1996) (vacating district court's decision to allow assumption when lessee was not provided formal notice and was deprived of an opportunity to contest the matter); *In re Typocraft Co.*, 229 B.R. 685, 689 (Bankr. E.D. Mich. 1999) (disallowing "assumption by an informal, default method without the affirmative filing of a motion with notice to interested parties").

Strict adherence to the Code provisions governing assumption of contracts "might appear overly simplistic, [but] it is important in that it allows a debtor in possession the flexibility intended by the Bankruptcy Code in deciding whether or not to assume or reject contracts or leases." *Walat Farms, Inc. v. United States (In re Walat*

Farms, Inc.), 69 B.R. 529, 534 (Bankr. E.D. Mich. 1987). Also, the requirements of court approval and a hearing after notice to interested parties provide necessary safeguards to parties forced to maintain contractual relations with a reorganizing debtor. *See id.* "It is extremely important that interested parties be notified and have an opportunity to appear with regard to whether or not a debtor is going to assume. . . . " *Typocraft*, 229 B.R. at 689 (dealing with the assumption of a collective bargaining agreement); *see Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077, 1079 (9th Cir. 1989) ("Thus, these rules plainly specify that a debtor in possession must file a formal motion and provide reasonable notice and an opportunity for a hearing to the opposing party.").

The theoretical underpinnings of these cases cannot logically be restricted to those instances involving assumption by motion. Notice as a procedural safeguard cannot expand or contract based solely upon the procedural choice of the debtor when the ramifications to the non-debtor party are no less severe. Not surprisingly, the limited number of courts that have explicitly addressed this issue adopt the same approach taken by the district court in *REPH*.

In *In re Flugel*, 197 B.R. 92 (Bankr. S.D. Cal. 1996), chapter 13 debtors provided for the assumption of a nonresidential real estate lease in a special provision attached to their plan. *See* 197 B.R. at 94. Under this provision, debtors sought to assume the unexpired lease, cure the existing pre-petition default, and provide adequate assurance of future performance. *See id.* The *Flugel* court faced the question of whether the special assumption provision in the plan was adequate to satisfy the Bankruptcy Code's

notice requirements. Discussing favorably the analysis of § 365 and Rule 6006 employed in *REPH*, the court held that notice was sufficient because the non-debtor party was served with a mailing "which included specific notice that the Debtors intended to assume the lease." *Id.* at 94-95. Once the non-debtor was served with the notice, it had an opportunity to determine whether it needed to contest the proposed cure provisions of the plan.

The *Flugel* court noted that the same analysis had also been applied in *Riddle v. Aneiro* (*In re Aneiro*), 72 B.R. 424 (Bankr. S.D. Cal. 1987). In that case, the court arrived at the same conclusion as the *REPH* and *Flugel* courts – the debtor had a responsibility to assure that the non-debtor party to the contract or lease was on notice of the debtor's specific intent to assume the lease so as to be able to evaluate whether the assumption criteria were satisfactory. *See Aneiro*, 72 B.R. at 427. In *Aneiro*, the non-debtor received a copy of the chapter 13 debtor's plan which contained a provision explaining the assumption. In both *Aneiro* and *Flugel*, the courts were in part attempting to decide whether an assumption under a plan still required the filing of a motion. Clearly neither court would have been satisfied with mere "pendency of the action" notice since both contemplated that at a minimum the non-debtor would receive either the proposed plan or some form of notice setting forth the debtor's intent to assume. Ultimately, the *Aneiro* court held that the motion to assume was "made" when the non-debtor party to the lease was served notice of the plan's filing. *See* 72 B.R. at 428. The identical approach has been applied by other courts. *See, e.g., In re Hall*, 202 B.R. 929, 932-33 (Bankr.

W.D. Tenn. 1996) (notice requirements satisfied by delivery of notice with plan attached).

This result is the only course that is consistent with the notice analysis in cases involving rejection of a contract, in which a claim arises stemming from the rejection and the non-debtor is then allowed to assert an unsecured claim for damages. *See, e.g., In re Parkwood Realty Corp.*, 157 B.R. 687 (W.D. Wash. 1993). In *Parkwood*, the court explained:

> These provisions read together clearly contemplate that a party to an executory contract will receive notice of rejection when it receives a copy of the Disclosure Statement and Plan, giving it a window in which to file a proof of claim for damages. A party which has not even had notice of the plan, let alone the debtor's intention to reject, is given no opportunity to file a claim. To hold that a claim has been discharged under these circumstances would clearly violate due process.

In re Parkwood, 157 B.R. at 690.

Accordingly, we hold that the debtor had responsibility to assure that the non-debtor party was on notice of the debtor's specific intent to assume the contract. Unless there is a showing that the non-debtor possessed actual knowledge of a sufficiently refined degree, the debtor must demonstrate delivery of the proposed plan of reorganization or some other court-ordered notice that set forth National Gypsum's intent to assume the Wellington Agreement with a $0 cure amount. With the proper standard now in mind, we turn to the facts of this case.

3. A Fact Question Exists as to Formal Notice

National Gypsum asserts that Century received adequate formal notice because, as the summary judgement record shows, a number of notices were sent over the course of almost a year to attorney Lynn Bregman. Ms. Bregman, who represented Century in a separate insurance case involving National Gypsum that took place in the Southern District of New York and was settled by June 1989, asserts that neither she nor any other attorney at Wilmer, Cutler & Pickering was ever retained to represent Century in the National Gypsum bankruptcy proceedings. Bregman further states that a search of the firm's files failed to uncover any of the following notices or documents: (1) the Notice of Assumption and Assignment of Certain Executory Contracts and Unexpired Leases and Amount of Cure Payment, If Any, (2) the solicitation package (consisting of the solicitation letter, the Court's Order Approving Debtor's Disclosure Statement, a ballot and ballot instructions for the Debtor's Plan, and the statement of position regarding the Debtor's Plan), nor (3) a copy of the Plan itself. The import of these particular notices and documents is that they are the few crucial documents that set forth the requisite information concerning the assumption and cure amount that would have alerted Century of alleged error in cure amount. On the other hand, none of the numerous peripheral mailings whose receipt is not contested contained any material related to the assumption of the executory contract with a $0 cure amount.[11]

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[11] Neither of the lower courts truly ventured into the battle over whether Ms. Bregman was a proper representative upon which to serve notice in this litigation. Since Ms. Bregman's

Therefore, the bankruptcy court correctly recognized the existence of a fact issue regarding Century's receipt of pre-confirmation notice of National Gypsum's intent to assume the Wellington Agreement with a $0 cure amount.

National Gypsum also argues that Century had sufficient actual knowledge. The summary judgment proof does establish that Joseph Proko, Century's vice-president in charge of special asbestos matters, was aware that the National Gypsum reorganization had commenced in 1990. Through his work as Century's representative to the Asbestos Claims Facility, Proko received status reports on the Facility's activities which often reference ongoing developments in asbestos litigation. National Gypsum's summary judgment proof contains a group of status reports dated throughout 1991 that made brief mention of a dispute over whether the bankruptcy court would approve National Gypsum's continued participation in the Facility. The reports do not discuss any other aspect of the National Gypsum reorganization; specifically, there was no mention of bar dates, assumption of the Wellington Agreement, default status on interest, deadlines for objections, discussion of the solicitation package, or the plan. Accordingly, the summary judgment record does not reflect that Century was sufficiently aware of National Gypsum's intent to assume with a $0 cure.

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connection to this litigation was not central to the bankruptcy court's analysis, the record is somewhat deficient in that regard and therefore precludes a definitive ruling here. The record can be further developed on remand if it is determined that the critical notices were in fact sent to Century.

In conclusion, the bankruptcy court ordered National Gypsum to provide notice, pursuant to the requirements of the Bankruptcy Code and Bankruptcy Rules, of its specific intent to assume the Wellington Agreement. If such notice was not given, then the bankruptcy court erred in permitting National Gypsum to assume the Wellington Agreement with a $0 cure amount.

Our holding on the notice issue obviates the need to resolve the disagreement below concerning the proper interpretation of the bankruptcy court's retention of jurisdiction language. Since *res judicata* can not operate to bar Century's claim if notice was inadequate, summary judgment in favor of National Gypsum was inappropriate.

III. CONCLUSION

For the reasons set forth above, We AFFIRM the district court's decision.

In re: NATIONAL GYPSUM COMPANY,
Debtor.
CENTURY INDEMNITY COMPANY,
Appellant,
v.
NGC SETTLEMENT TRUST, Appellee.
NGC SETTLEMENT TRUST, Appellant,
v.
INSURANCE COMPANY OF NORTH AMERICA,
Appellee.

No. 390-3721-SAF-11, 3:97-CV-2613-G,
3:97-CV-2614-G.

United States District Court, N.D. Texas.

Aug. 27, 1998.

MEMORANDUM ORDER

FISH, District J.

These cases are before the court on the appeal of Century Indemnity Company ("Century") and the cross-appeal of Asbestos Claims Management Corporation and NGC Settlement Trust (collectively, "National Gypsum") from the orders of the bankruptcy court granting summary judgment to National Gypsum. These appeals present three issues: (1) whether Century's preconfirmation right to payment on an executory contract which was assumed under National Gypsum's reorganization plan survived confirmation of the plan; (2) whether general notice of the pendency of the bankruptcy proceeding satisfied National Gypsum's duty to provide reasonable notice of its intent to assume this executory contract under its plan of reorganization; and (3) whether determination of the cure amount in the bankruptcy court's confirmation order is final for purposes of *res judicata*.

Because this court answers the first issue in the affirmative and the second and third in the negative, the bankruptcy court's ruling is affirmed in part, reversed in part, and remanded for further proceedings.

I. BACKGROUND

Century is the successor in interest of a party to an executory contract known as the "Wellington Agreement." Brief of Appellant Century Indemnity Company ("Century Brief") at 1 n. 1 and 4. In the mid-1980's, several asbestos producers and certain of their insurers entered into the Wellington Agreement to settle indemnity and contribution issues arising from numerous asbestos-related claims. *Id.*; see also Brief of Appellees and Cross-Appellants NGC Settlement Trust and Asbestos Claims Management Corporation ("National Gypsum Brief") at 5. Under the terms of the agreement, the signatory insurers, including Century's predecessor, were to make payments necessary to fill the gaps in coverage left by non-signatory insurers. Century Brief at 4. In return, the asbestos producers, including National Gypsum, were to attempt to obtain coverage from the non-signatory insurers and, under certain circumstances, were to pay interest to the signatory insurers on the "gap-filling" payments. *Id.* at 5.

National Gypsum filed a Chapter 11 bankruptcy petition in October of 1990. National Gypsum Brief at 6. As a part of the reorganization plan, National Gypsum sought to assume the Wellington Agreement and numerous other

executory contracts. *Id.* The National Gypsum plan represented that the cost to cure all defaults under the Wellington Agreement was $0. *Id.* at 6-7. In March of 1993, the bankruptcy court confirmed the National Gypsum plan of reorganization but "retain[ed] jurisdiction to determine any disputes as to the amount of defaults, if any, required to be cured under Section 365(b) of the Bankruptcy Code with respect to any such executory contract. . . . " Notice of Entry of Order Confirming the First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc. ("Confirmation Order") at 10, attached as Exhibit L to Appendix to Century Indemnity Company's Brief in Opposition to Motion for Summary Judgment (Tab 14 in appellate record). Century did not appeal the bankruptcy court's entry of the Confirmation Order.

In October 1995, National Gypsum brought a declaratory judgment action in the wake of attempts by Century to recover amounts allegedly due under the Wellington Agreement. National Gypsum Brief at 2. Following discovery, National Gypsum moved for summary judgment. *See generally* Motion for Summary Judgment of Plaintiffs Asbestos Claims Management Corporation and NGC Settlement Trust (Tab 7 in appellate record). National Gypsum claimed that the Confirmation Order discharged any and all amounts previously due under the Wellington Agreement. *Id.* at 2.

After a hearing, the bankruptcy court, Judge Steven A. Felsenthal presiding, granted summary judgment in favor of National Gypsum. Order at 2 (Oct. 22, 1996) (Tab 17 in appellate record). Judge Felsenthal found that Century's general knowledge of the bankruptcy provided

notice sufficient to bind Century by the Confirmation Order and that the Confirmation Order discharged Century's pre-confirmation claims. Transcript of Proceedings (Sept. 20, 1996) at 6-12 (Tab 16 in appellate record). Upon Century's motion to set aside the judgment, the bankruptcy court modified its reasoning but not its ruling. *See* generally Transcript of Proceedings (Mar. 28, 1997) (Tab 24 in appellate record); Order (July 15, 1997) (Tab 29 in appellate record). Judge Felsenthal ultimately held that, although confirmation of the plan did not discharge Century's right to payment under the Wellington Agreement, Century was "precluded by the doctrine of *res judicata* . . . from asserting that any amount other than zero was due. . . . " Order (July 15, 1997) at 2.

II. ANALYSIS

A. Standard of Review

On appeal, a bankruptcy court's findings of fact are reviewed for clear error and its legal conclusions are reviewed *de novo*. *E.g., Matter of Young*, 995 F.2d 547, 548 (5th Cir. 1993). This case is on appeal from a grant of summary judgment in favor of National Gypsum. Summary judgment is appropriate if the pleadings and evidence on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Matter of Criswell*, 102 F.3d 1411, 1414 (5th Cir. 1997). Thus, this court reviews the bankruptcy court's summary judgment ruling *de novo*. *Id.*

B. Assumption of Executory Contracts

On cross-appeal, National Gypsum claims that the bankruptcy court erred in finding that Century's claims were not discharged. *See* National Gypsum Brief at 30-46. National Gypsum argues that confirmation of the plan of reorganization discharged its pre-confirmation debts by virtue of § 1141(d) of the Bankruptcy Code.[1] *Id.* at 30. National Gypsum then cites various code provisions defining "debt" and "claim." *Id.* at 31. Based on those definitions, National Gypsum maintains that any pre-confirmation liability to Century under the Wellington Agreement was a "debt" discharged by the Confirmation Order. *Id.* at 30.

Were this a claims allowance and discharge issue, National Gypsum's assertion would be correct. But, as the bankruptcy court accurately observed, "this is not a claims allowance and discharge issue. This is an assumption of an executory contract under [11 U.S.C.] Section 365 issue." Transcript of Proceedings (Mar. 28, 1997) at 7. By framing the issue incorrectly, National Gypsum reaches a result that is necessarily flawed.

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[1] This subsection provides in relevant part: (1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan – (A) discharges the debtor from any debt that arose before the date of such confirmation

. . . .

11 U.S.C. § 1141(d).

The Fifth Circuit recently addressed the relationship between Sections 365 and 1141 in the context of an unexpired lease:

> Section 365(g) . . . explains that the rejection of an unexpired lease constitutes a breach of the lease, giving rise to a claim. Therefore, under the Bankruptcy Code, a lease that has been assumed under a plan or pursuant to section 365 does not give rise to a claim. Absent a claim, there can be no liability on a claim and, thus, no debt. Absent a debt, there is nothing to be discharged pursuant to section 1141.

Wainer v. A.J. Equities, Ltd., 984 F.2d 679, 684-85 (5th Cir. 1993) (citations omitted). National Gypsum invites this court to disregard the teachings of *Wainer* as *dicta* or to construe them so narrowly that they apply only when the debtor subsequently assigns the assumed lease or contract. National Gypsum Brief at 38-46.

This is an invitation the court must decline. Although this passage from *Wainer* is arguably *dicta*, it is extremely cogent. Moreover, it provides significant insight into the reasoning of this court's reviewing tribunal. Thus, even if *Wainer* is not binding authority, this court finds it exceedingly persuasive. In addition, National Gypsum's reasoning would permit a debtor to accept the benefits of an executory contract while avoiding the corresponding burdens. It is settled beyond peradventure that a debtor may not do so. *See, e.g., Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985) ("the debtor cannot choose to accept the benefits of the contract and reject its burdens to the detriment of the other party to the agreement."); 3 Collier on Bankruptcy ¶ 365.03[1]

(Lawrence P. King ed. 1998) ("The trustee must either assume the entire contract, cum onere, or reject the entire contract, shedding obligations as well as benefits."). Accordingly, this court holds that the bankruptcy court did not err in concluding that Century's right to payment under the Wellington Agreement was not a "debt" discharged by confirmation of the reorganization plan.

C. Effect of the Confirmation Order

Having determined that the bankruptcy court was correct in concluding that Century's rights were not discharged as debts, this court must next address the effect of the Confirmation Order on those rights. Century argues that the bankruptcy court erred in finding that National Gypsum provided adequate notice of its intention to assume the Wellington Agreement with a zero cure amount and in finding that the zero cure amount was *res judicata*. This court will address each contention in turn.

1. Sufficiency of Notice

The bankruptcy court addressed the issue of notice at its first summary judgment hearing on September 20, 1996. There the court found that genuine issues of fact existed as to whether, before confirmation, Century received a copy of the plan or notice of National Gypsum's intention to assume the Wellington Agreement

with a zero cure amount.[2] Transcript of Proceedings (Sept. 20, 1996) at 6. Nevertheless, the bankruptcy court, citing *Matter of Christopher*, 28 F.3d 512 (5th Cir. 1994), concluded that Century's general knowledge of the bankruptcy satisfied the demands of due process. *Id.* at 9-10. This holding was reiterated in the bankruptcy court's written order dated October 22, 1996. *See* Order (Oct. 22, 1996) at 2.

Were this a claims allowance and discharge issue, the ruling would be correct. *See Matter of Christopher*, 28 F.3d at 517; *see also Matter of Sam*, 894 F.2d 778, 781-82 (5th Cir. 1990). But this is an assumption of an executory contract issue, not a claims allowance and discharge issue. As a result, *Christopher* and *Sam* are factually inapposite. Although the bankruptcy court perceived this difference correctly in ruling on National Gypsum's claim of discharge, it inexplicably failed to observe the same distinction with regard to notice.[3]

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[2] As the bankruptcy court stated:

[T]he Court concludes that there are genuine issues of material fact of whether [Century] received formal notice of a motion or notice of intent to assume the Wellington Agreement, formal notice of the confirmation hearing with the plan showing assumption of the Agreement with a zero cure amount, and formal notice of the entry of the confirmation order. The Court assumes for purposes of this summary judgment motion that [Century] did not receive those formal notices.

Transcript of Proceedings (Sept. 20, 1996) at 6.

[3] At the initial hearing, the bankruptcy court stated that it could discern no difference between the sufficiency of notice to file an objection to the assumption of a contract and the sufficiency of notice to file a claim. Transcript of Proceedings (Sept. 20, 1996) at 10. But there are significant, fundamental

More closely analogous to the present matter is the case of *In re REPH Acquisition Company*, 134 B.R. 194 (N.D.Tex.1991). In *REPH*, the Honorable Sidney A. Fitzwater of this court decided a bankruptcy appeal involving an order denying a motion to assume an unexpired lease. *Id.* at 195. Judge Fitzwater affirmed the denial of the motion to assume. *Id.* at 202. In so doing, he rejected the Chapter 11 debtor's assertion that general notice of the existence of a plan of reorganization provided sufficient notice of the debtor's intent to assume the unexpired lease as part of the plan.[4] *Id.* at 199. Instead, he held

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differences in the nature of the transactions underlying each. With claims, the creditor risks only the loss of a right to payment. But assumption of an executory contract affects both the rights and the continuing contractual duties of the non-debtor party. Although general notice of the pendency of bankruptcy proceedings may provide reasonable notice of the risk of loss of a right to payment, it provides no information to non-debtor parties of the status of their obligations under executory contracts. Only notice of assumption or rejection can accomplish this task.

[4] As Judge Fitzwater explained: Rule 6006(a) excuses the procedure that applies in contested matters when a proceeding to assume an unexpired lease is "part of a plan." Fairly interpreted, Rule 6006(a) does not eliminate the notice requirements applicable to a contested matter. Rule 9014, which governs contested matters not otherwise covered by the Bankruptcy Rules, requires that relief be requested on reasonable notice to the party against whom the relief is sought. The court holds that Rule 6006(a) implies a similar obligation upon a debtor who seeks to assume an unexpired nonresidential lease by means of its proposed reorganization plan. This means that although the plan itself constitutes the act of assumption contemplated by § 365(d)(4), the lessor, as the party against whom the relief is sought, must be given reasonable notice of the debtor's intent. Even if Rule 6006(a) cannot be read to

that the debtor had responsibility to assure that the lessee was on notice of the debtor's specific intent to assume the lease. *See id.*

In the present case, the bankruptcy court recognized a fact issue regarding Century's receipt of preconfirmation notice of National Gypsum's intent to assume the Wellington Agreement with a zero cure amount. Transcript of Proceedings (Sept. 20, 1996) at 6. The Bankruptcy Code required National Gypsum to provide such notice. *REPH*, 134 B.R. at 199. If such notice was not given, and the bankruptcy court assumed for purposes of its decision that it was not, Transcript of Proceedings (Sept. 20, 1996) at 6, then the bankruptcy court erred in permitting National Gypsum to assume the Wellington Agreement with a zero cure amount.

2. *Res Judicata*

Despite this error, summary judgment in favor of National Gypsum would nevertheless have been proper if the Confirmation Order were *res judicata* as to the cure amount. *See Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987). *Res judicata* is a pragmatic rule and applies in bankruptcy proceedings, as in any other matter, to preclude a party from relitigating claims that

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incorporate the notice requirement of Rule 9014, § 1125(b) of the Code plainly requires that the contents of a proposed reorganization plan be adequately disclosed.

REPH, 134 B.R. at 199 (footnote omitted).

should have been, but were not, raised earlier.[5] *See id.* at 1051. Following Century's motion to set aside, the bankruptcy court held, without significant elaboration, that Century was precluded from challenging the zero cure amount. *See* Transcript of Proceedings (Mar. 28, 1997) at 5; Order (July 15, 1997) at 2. This ruling is assailed or supported by the parties with numerous arguments on appeal. *See Century Brief* at 26-34; *National Gypsum Brief* at 21-27.

Upon review of the Confirmation Order, this court concludes that it is not *res judicata* on the issue of cure. " '[A] final judgment for purposes of *res judicata* must finally dispose of some matter which under the substantive law to be applied and the procedural law of the forum can be, and has been, finally disposed of." ' *Republic Supply*, 815 F.2d at 1053 (quoting *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870 n. 10 (5th Cir. 1984)). The Confirmation Order did not "finally dispose of" the issue of cure amounts. Rather, it unambiguously anticipated disputes regarding cure amounts and retained jurisdiction to hear them. *See* Confirmation Order at 10. Therefore, the Confirmation Order was not final on the issue of cure and does not preclude Century from disputing the amount of default on the Wellington Agreement. Accordingly, summary judgment in favor of National Gypsum was inappropriate.

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[5] For a matter to be res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases. *Nilsen v. City of Moss Point, Mississippi*, 701 F.2d 556, 559 (5th Cir. 1983) (en banc).

III. CONCLUSION

For the foregoing reasons, the judgment of the bankruptcy court is AFFIRMED on the issue of discharge, REVERSED on the issue of notice, REVERSED on the issue of *res judicata*, and REMANDED for further proceedings not inconsistent with this opinion.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: NATIONAL GYPSUM COMPANY, Debtor.	BANKRUPTCY CASE NO. 390-37213-SAF-11
CENTURY INDEMNITY COMPANY Appellant, VS. NGC SETTLEMENT TRUST, Appellee.	CIVIL ACTION NO. 3:97-CV-2613-G
NGC SETTLEMENT TRUST, Appellant, VS. INSURANCE COMPANY OF NORTH AMERICA, Appellee.	CONSOLIDATED WITH 3:97-CV-2614-G ENTERED ON DOCKET AUG. 27, 1998 PURSUANT TO F.R.C.P. RULES 58 AND 79a

JUDGMENT

These cases were submitted on the briefs and records on appeal. On consideration whereof, it is **ORDERED** that the orders of the bankruptcy court are **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** to the

bankruptcy court for further proceedings not inconsistent with the memorandum order of this date.

August 27, 1998.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
NATIONAL GYPSUM COMPANY, AANCOR HOLDINGS, INC.,	§	CASE NO. 390-37213-SAF-11
	§	CASE NO. 390-37214-SAF-11
DEBTOR.	§	(Jointly Administered)
NGC SETTLEMENT TRUST and ASBESTOS CLAIMS MANAGEMENT CORPORATION,	§	ADVERSARY NO. 395-3480
PLAINTIFFS,	§	
VS.	§	
INSURANCE COMPANY OF NORTH AMERICA,	§	
DEFENDANT.	§	

AMENDED ORDER

Based on the court's bench ruling of March 28, 1997, together with the court's bench ruling of September 20, 1996, as modified herein,

IT IS ORDERED that the court's order entered October 23, 1996, is **MODIFIED**, the court's order entered July 18, 1997, is **AMENDED**, and the plaintiffs' motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART.**

IT IS FURTHER ORDERED that the claims of Insurance Company of North America (INA) and its successors

in interest pursuant to the Agreement Concerning Asbestos-Related Claims dated June 19, 1985, (the Wellington Agreement), were not discharged in the above-captioned Chapter 11 case of National Gypsum Company. INA and its successors in interest are not enjoined under §§ 524(a) and 1141(d) of the Bankruptcy Code and the confirmation order entered March 9, 1993, from obtaining recovery from the NGC Settlement Trust (NGC Trust) and Asbestos Claims Management Corporation (ACMC) of claims under Section XX of the Wellington Agreement, whether the claims arose prior to or after the March 9, 1993, confirmation order in the Chapter 11 case of National Gypsum Company.

IT IS FURTHER ORDERED that INA and its successors in interest are precluded by the doctrine of res judicata under *Republic Supply v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987), and *Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512 (5th Cir. 1994), from asserting that any amount other than zero was due under Section XX of the Wellington Agreement up to the March 9, 1993, confirmation order. NGC Trust and ACMC are precluded from asserting that the confirmation order relieves them from fulfilling obligations under the Wellington Agreement that became due after March 9, 1993, including Section XX. INA and its successors in interest are not precluded by res judicata or collateral estoppel from seeking to recover interest amounts under the Wellington Agreement that became due after the March 9, 1993, confirmation order. The contractual obligations, if any, were assumed by ACMC in the Chapter 11 case and are consequently binding and enforceable against ACMC.

IT IS FURTHER ORDERED that disputes, if any, regarding INA and its successors in interest's post-confirmation claims, if any, shall be resolved pursuant to the mechanism established in the Wellington Agreement. NGC Trust and ACMC are not precluded from raising applicable non-bankruptcy defenses to these claims, except as otherwise stated in this order.

IT IS FURTHER ORDERED that the NGC Trust shall make no payment to INA or its successors in interest until further order of this court, upon motion filed in the underlying bankruptcy case of National Gypsum Company, case no. 390-37213-SAF-11, and notice.

IT IS FURTHER ORDERED that all parties shall bear their own attorney's fees and costs.

IT IS FURTHER ORDERED that this constitutes the final order of this court on the merits of this dispute.

Signed this 8th day of ~~July~~ Sept., 1997.

/s/ Steven A. Felsenthal
Steven A. Felsenthal
United States
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
NATIONAL GYPSUM COMPANY, AANCOR HOLDINGS, INC.,	§	CASE NO. 390-37213-SAF-11
	§	CASE NO. 390-37214-SAF-11
DEBTOR.	§	(Jointly Administered)
NGC SETTLEMENT TRUST and ASBESTOS CLAIMS MANAGEMENT CORPORATION,	§	ADVERSARY NO. 395-3480
PLAINTIFFS,	§	
VS.	§	
INSURANCE COMPANY OF NORTH AMERICA,	§	
DEFENDANT.	§	

ORDER

Based on the court's bench ruling of March 28, 1997, together with the court's bench ruling of September 20, 1996, as modified herein,

IT IS ORDERED that the court's order entered October 23, 1996, is **MODIFIED**, and the plaintiffs' motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART.**

IT IS FURTHER ORDERED that the claims of Insurance Company of North America (INA) and its successors in interest pursuant to the Agreement Concerning

Asbestos-Related Claims dated June 19, 1985, (the Wellington Agreement), were not discharged in the above-captioned Chapter 11 case of National Gypsum Company. INA and its successors in interest are not enjoined under §§ 524(a) and 1141(d) of the Bankruptcy Code and the confirmation order entered March 9, 1993, from obtaining recovery from the NGC Settlement Trust (NGC Trust) and Asbestos Claims Management Corporation (ACMC) of claims under Section XX of the Wellington Agreement, whether the claims arose prior to or after the March 9, 1993, confirmation order in the Chapter 11 case of National Gypsum Company.

IT IS FURTHER ORDERED that INA and its successors in interest are precluded by the doctrine of res judicata under *Republic Supply v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987), and *Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512 (5th Cir. 1994), from asserting that any amount other than zero was due under Section XX of the Wellington Agreement up to the March 9, 1993, confirmation order. NGC Trust and ACMC are precluded from asserting that the confirmation order relieves them from fulfilling obligations under the Wellington Agreement that became due after March 9, 1993, including Section XX. INA and its successors in interest are not precluded by res judicata or collateral estoppel from seeking to recover interest amounts under the Wellington Agreement that became due after the March 9, 1993, confirmation order. The contractual obligations, if any, were assumed by ACMC and were ordered to be transferred to the NGC Trust in the Chapter 11 case, and are consequently binding and enforceable.

IT IS FURTHER ORDERED that disputes, if any, regarding INA and its successors in interest's post-confirmation claims, if any, shall be resolved pursuant to the mechanism established in the Wellington Agreement. NGC Trust and ACMC are not precluded from raising applicable non-bankruptcy defenses to these claims, except as otherwise stated in this order.

IT IS FURTHER ORDERED that the NGC Trust shall make no payment to INA or its successors in interest until further order of this court, upon motion filed in the underlying bankruptcy case of National Gypsum Company, case no. 390-37213-SAF-11, and notice.

IT IS FURTHER ORDERED that all parties shall bear their own attorney's fees and costs.

IT IS FURTHER ORDERED that this constitutes the final order of this court on the merits of this dispute.

Signed this 15th day of July, 1997.

/s/ Steven A. Felsenthal
Steven A. Felsenthal
United States
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	) BK NO. 390-37213-SAF-11
NATIONAL GYPSUM COMPANY	) ADV. NO. 395-3480
	)
	)

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TRANSCRIPT OF PROCEEDINGS

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(Filed Aug. 4, 1997)

BE IT REMEMBERED that on the 28th day of March, 1997, before the HONORABLE STEVEN FELSENTHAL, United States Bankruptcy Judge at Dallas, Texas, the above styled and numbered cause came on for hearing, and the following constitutes the transcript of such proceedings as hereinafter set forth:

APPEARANCES

Mr. Sander Esserman
STUTZMAN & BROMBERG
2323 Bryan Street
Suite 2200
Dallas, TX 75201

FOR THE DEBTOR

Mr. Stephen Goodwin
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL
200 Crescent Court
Suite 1500
Dallas, TX 75201

FOR CENTURY INDEMNITY

PROCEEDINGS

[3] THE COURT: National Gypsum matter with INA. This is adversary 395-3480. I'll take appearances.

MR. ESSERMAN: Sander L. Esserman with Stutzman and Bromberg here on behalf of the trust. And Mr. Dee Hill, the trustee, is also present.

MR. GOODWIN: Steve Goodwin on behalf of Century Indemnity and Insurance Company of North America.

THE COURT: Did I hear that your colleague in Los Angeles is ill?

MR. GOODWIN: Yes. John Niles, he was having trouble with hearing and went in to see his ear doctor. And they ran the typical tests, and it didn't produce anything. So they took another level, and he had a non-malignant tumor that was pressing on his auditory nerve. And he had surgery on March the 17th which was a week ago. And I think he's doing fine. It was non-malignant. And he is communicating with his laptop, but he will have to go through some rehabilitation. Apparently it affects his balance. And he's going to have to get up and learn a little bit about how to walk again. He's planning to be back in full swing end of May.

THE COURT: That's frightening.

MR. GOODWIN: It really is. It happened so quick.

THE COURT: Give him my best regards.

[4] MR. GOODWIN: I will indeed. Thank you, Your Honor.

THE COURT: And I appreciate that you're available today. I really did not mean for this to be sitting on this stack that I've been working on for so long because it's really a pretty short ruling. I thought I would do it by bench ruling.

On October 23, 1996, the Court entered an order granting the plaintiff's motion for summary judgment. In the order the Court directed that the parties brief the issue of the extent of the claims comprehended in Section XX of the Wellington agreement. The Court set a briefing schedule. Based on that order the parties submitted their briefs, and the Court took the matter under advisement on January 31, 1997. In addition, INA filed a motion to set aside the Court's summary judgment ruling. The parties have submitted written arguments on that motion.

The Court will address both motions by this bench ruling. The Court had intended to decide these motions by bench ruling last month, but due to the press of court business had not been able to reach them. I mention this because this ruling is fairly brief and the Court understands that the parties will be before the 5th Circuit shortly. And I wanted the parties to at least have the benefit of this ruling before that time.

[5] The Court recognizes that the defendant is Century Indemnity Company, but for ease of this ruling I'm going to continue to refer to Century's predecessor, INA. Similarly although the plaintiffs are the NGC settlement trust and Asbestos Claims Management Corporation, the ruling will either make references to them as the plaintiffs or the Court will refer to National Gypsum Company. I

believe that will be the appropriate entity at the point in time it's involved.

National Gypsum Company as part of its plan of reorganization assumed the Wellington agreement. The Court as part of the confirmation order approved the assumption of the Wellington agreement. The Court adjudicated the cure amount for the assumption agreement for INA at zero. In the summary judgment ruling on September 20, 1996, the Court held that INA was bound by that ruling. Confirmation order with the approval of the assumption of the executory contract was final and non-appealable. Pursuant to Sequa Corporation versus Christopher and Republic Supply versus Shoaf and its progeny, the Court held that INA was bound by that ruling.

The plaintiffs had requested that the Court thereby hold that INA's claims were discharged pursuant to Section 524(a) and 1141(d)(1) of the Bankruptcy Code and the confirmation order. The Court entered an order to that [6] effect.

INA argues in its motion for relief from the summary judgment ruling that the Court misapplied 5th Circuit case law. The Court agrees. The correct application of the Code and the case law does not change the result. The Wellington agreement had been assumed by National Gypsum Company pursuant to Section 365. To assume the agreement, National Gypsum Company had to cure any default. The Court determined that National Gypsum Company owed INA no amount as the cure payment. Thus, as of the confirmation of the debtor's plan,

National Gypsum was held to be in compliance with the Wellington agreement. INA is bound by that decision.

The correct ruling is that INA is precluded under Section 365 and the confirmation order from recovering from the plaintiffs on any amount under Section XX of the Wellington agreement arising on or before March 9, 1993. The INA claim under the Wellington agreement was neither discharged nor enforcement enjoined. Rather, the claim had been cured by the assumption of the agreement and the payment of the adjudicated cure amount. INA is precluded from contending to the contrary.

But, upon assumption, National Gypsum and its successors were assigned became obligated to perform pursuant to the Wellington agreement. Like INA, the [7] plaintiffs are bound by the confirmation order approving the assumption of the agreement. The plaintiffs must perform obligations under the agreement that become due and owing after March 9, 1993. By assuming the Wellington agreement, National Gypsum Company and its successors pursuant to the confirmation order and the plan must perform under the agreement.

Accordingly, amounts due under Section XX from March 9, 1993 to the end of March 1994 are binding contractual obligations. INA is not precluded by the confirmation order or the Bankruptcy Code from pursuing those claims. To the contrary, Section 365 contemplates further performance of obligations of an assumed contract when they become due. Failure to perform would subject the plaintiffs to INA contractual and non-bankruptcy remedies.

In the bench ruling of September 20, 1996, the Court explained that if the National Gypsum case involved only claims arising out of the Wellington agreement, the issue would be resolved by Section 524(a) and 1141(d)(1). But this is not a claims allowance and discharge issue. This is an assumption of an executory contract under Section 365 issue.

Applying the Timbers admonition on how to read the Bankruptcy Code, the Code must be read as a whole. All of its provisions must be given meaning and harmonized. The [8] language of each section of the Code must be read to make the Code coherent and consistent. The plaintiffs contend that the Court should determine that because the Section XX obligations under the Wellington agreement arose pre-petition, the Court should determine that they constitute a claim as broadly defined by the Code. As a claim, the plain language of Section 1141 would discharge that. But Section 1141's language cannot be applied to negate the effect of Section 365.

Section 1141(d)(1) discharges the debtor from debts that arose pre-confirmation except, says the statute, as otherwise provided in Section 1141 or as provided in a plan or as provided in confirmation. Section 1141(d)(1)(A) refers to Section 502(g) which addresses claims based on the rejection of an executory contract. It does not address claims based on the assumption of an executory contract because the contract cannot be assumed without complying with Section 365(b)(1). And the plan of National Gypsum provided for the assumption of the Wellington agreement, and the confirmation order approved that assumption.

Thus, 1141(d)(1) itself contemplates that executory contracts, if assumed, would not be covered by the discharge, that is the assumption order not the discharge order. Section 1141(d)(1) further contemplates that a plan and a confirmation order can address claims that might [9] otherwise fall within Section 1141(d)(1). When that occurs, the relevant provision of the plan and confirmation order govern.

Here, that is exactly what happened. The plan and the confirmation order involved the assumption of the Wellington agreement. So the Court must turn to Section 365. Under Section 365, if an executory contract is rejected, the non-debtor party to the contract obtains a claim in the case as of the day before the filing of the bankruptcy petition.

Section 1141(d)(1) provides for the discharge of the debtor's liability on that claim. But if the contract is assumed, the debtor must cure its defaults. That's Section 365(b)(1)(A). The debtor must also compensate the other party for any pecuniary loss. That's 365(b)(1)(B). The non-debtor party will have thereby been made whole. The parties to the contract then proceed to perform post-assumption. By electing to assume the contract and by obtaining Court approval for the assumption, National Gypsum took the Wellington agreement obligations out of the claims process.

And this is the way I read the 5th Circuit cases. The parties have contested how the Court should read Wainer versus A.J. Equities, Limited. But the Court reads that if the debtor is successful in assuming an executory contract, [10] then under Section 365(b)(1) the debtor would

have cured non-performance and compensated the other party for any pecuniary loss. The 2nd Circuit said put it in a case called United States versus Carolina Parachute Corporation that the default would have been remedied. The 5th Circuit instructs that any liability in a claim up to that point in time would have thereby been satisfied. And as the Court said in Richmond Leasing, once assumed pursuant to Section 365, the debtor takes the contract subject to all its terms, including its future obligations.

Similar to the construction of the Bankruptcy Code, the Court must construe its confirmation order to give effect to all its provisions. If the Court applied the discharge and injunction portion of the confirmation order to preclude payment of amounts due under Section XX from March 9, 1993 to the end of March '94, the Court would nullify the effect of the portion of the confirmation order approving the assumption of the contract.

So it's this Court's assessment of the party situation that both sides to the dispute must accept the consequences of the confirmation order. INA is precluded from now asserting that any amount other than zero was due under Section XX under the Wellington agreement up to March 9, 1993. The plaintiffs are precluded from asserting that the confirmation order relieves them from fulfilling [11] obligations under Section XX of the Wellington agreement that, may have actually become due after March 9, 1993. If the parties dispute the amounts due under Section XX after March 9, 1993, that dispute must be resolved pursuant to the terms of the agreed, of the assumed agreement and applicable non-bankruptcy law. So that's the ruling. And I know I have outstanding

attorneys' fees issues. Are there any other issues that would keep me from at least entering a final?

MR. GOODWIN: I think the only thing would be if there is a disagreement on calculation. And I don't know whether – I should be standing up – I'm not sure whether there is. And maybe we just need to talk. And perhaps that can be resolved as part of the order. And if in fact that's left unresolved, then we'll just put a provision in the order that says that the parties still disagree with regard to the amounts due in that year period and would request the Court or leave a blank for you to set a hearing on it.

THE COURT: Let me suggest, this is from March 9, 1993 to the end of March '94 period. And don't I recall, maybe this is the issue with the 5th Circuit which is why I really wanted to get this, at least this ruling out, so parties could think about it. And you can remind me if my memory is incorrect. But wasn't part of the issue that's now before the 5th Circuit whether the question on amount [12] due should go to arbitration. Okay. So in light of this ruling, wouldn't it be appropriate if there is a dispute on the post-March 9, 1993 amount that now it's post-assumption, post-confirmation, whatever the contract says for dispute resolution should govern and that should go to arbitration if you disagree on the amount.

MR. ESSERMAN: I think what we would like to do is study Your Honor's ruling and then make a decision.

THE COURT: That's what you need to do. If you agree on the amounts, then I don't mind putting it in the order.

MR. GOODWIN: The hearing on the arbitration issue before the 5th Circuit was scheduled for next Tuesday and has been postponed to the first week in June because of Mr. Niles' illness. So we have got a little bit of time. I think I understand the ruling is simple. You may not want to record this, but we've been shoafed.

THE COURT: We have both been shoafed in effect.

MR. GOODWIN: Simple as that. I think I would like to order the transcript. And I'm sure Sandy would also. And why don't we try and prepare an agreement.

THE COURT: My suggestion would be at this point we can probably proceed to a final –

MR. GOODWIN: I think so.

THE COURT: – adjudication. And my inclination is [13] submit the order in, that neither side should get attorney's fees because of the effect the application to show each side has prevailed in an aspect of the litigation. And I don't think start apportioning attorney's fees as a result of that. And if you then can agree on adjudication of amounts due after March 9, on the other hand if it should go to arbitration. And that is the ruling you're left with your contractual and non-bankruptcy remedies after the assumption and the confirmation.

MR. ESSERMAN: Your Honor, the trust never contended that post-confirmation it had a Wellington agreement that it had to comply with, and it has complied with post-confirmation. That has never been in dispute. What is in dispute, and we will have to study Your Honor's ruling to understand the implications is there

were pre-petition advances made by INA. And it was an interest charge on the pre-petition advances that was claimed as a claim under the Wellington agreement. And that claim was adjudicated at zero in the bankruptcy. And INA has continued to charge interest on that post-assumption. That's the essence of the claim of INA. It has never been a post-March, for instance, advance or claim.

THE COURT: Well –

MR. ESSERMAN: That we have contended.

THE COURT: Let's go off the record. Before we go [14] off the record, the ruling addresses that. Let's go off the record.

(End of Proceedings.)

CERTIFICATE

[15] I, Rhonda Mears, Acting Official Court Reporter in and for the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, certify that during the hearing of the above entitled and numbered cause I reported in shorthand the proceedings hereinbefore set forth, and that the foregoing pages contain a full, true and correct transcription of said proceedings.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the 29th day of March, 1997.

/s/ Rhonda Mears
Rhonda Mears, CSR #3665
National Court Reporters
500 S. Ervay, Suite 120-A
Dallas, TX 75201
(214) 651-8393

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	Case No.
NATIONAL GYPSUM COMPANY, a Delaware corporation,	§	390-37213-SAF-11
	§	Chapter 11
Debtor.	§	
In re:	§	
AANCOR HOLDINGS, INC., a Delaware corporation,	§	Case No.
	§	390-37214-SAF-11
	§	Chapter 11
Debtor.	§	(Jointly Administered)
NGC SETTLEMENT TRUST and ASBESTOS CLAIMS MANAGEMENT CORPORATION,	§	
Plaintiffs,	§	Adversary No. 395-3480
vs.	§	
INSURANCE COMPANY OF NORTH AMERICA,	§	
Defendant.	§	

ORDER

On this day came on for consideration the Motion for Summary Judgment of Plaintiffs, Asbestos Claims Management Corporation and NGC Settlement Trust, and the Brief in Support thereof, the Brief in Opposition thereto

of Century Indemnity Company, the Reply Brief of Plaintiffs, the Complaint, and the Answer filed by Defendant Insurance Company of North America ("INA"), and after a hearing thereon, and for the reasons set forth in the transcript of this Court's September 20, 1996, opinion announced during the telephone conference call of the same day, including this Court's application of *Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512 (5th Cir. 1994), it is hereby ADJUDGED, ORDERED, and DECREED as follows:

Plaintiffs' Motion for Summary Judgment is GRANTED;

INA and its successors in interest and purported successors in interest with respect to the Agreement Concerning Asbestos-Related Claims dated June 19, 1985 (the "Wellington Agreement"), including Century Indemnity Company ("Century"), are enjoined under Sections 524(a) and 1141(d) of the Bankruptcy Code and the terms of the March 9, 1993, Confirmation Order and the Plan of Reorganization in the above-captioned bankruptcy proceeding from obtaining recovery from Plaintiffs or either of them on any claim under Section XX of the Wellington Agreement ("Section XX") arising on or before March 9, 1993 ("Discharged Section XX Claims"), and from any further attempts to recover in respect of any Discharged Section XX Claims;

The parties shall brief the Court regarding the extent of the claims comprehended in the Discharged Section XX Claims; namely, whether, as Plaintiffs contend, the Discharged Section XX

Claims comprise all Section XX claims for interest that arise out of pre-confirmation payments made by INA on or prior to March 9, 1993, or whether, as INA and Century contend, the Discharged Section XX Claims comprise and are limited to claims under Section XX for pre-confirmation interest that accrued on or prior to March 9, 1993. The schedule for such briefing shall be the following: Plaintiffs' brief shall be filed and served on or before thirty days from entry of this order; Defendants' response shall be filed and served on or before twenty days after receipt of Plaintiffs' brief, and Plaintiffs' reply if any, shall be filed and served on or before ten days after receipt of Defendants' brief.

Following this Court's resolution of the extent of the Discharged Section XX Claims, Plaintiffs shall file and serve on Defendant a statement of the amount of costs, attorneys' fees, and other amounts incurred by Plaintiffs. Such statement shall be in the form normally applicable to a submission for an award of attorneys' fees. Within twenty days after service of such statement, Defendant may file and serve on Plaintiffs any objections to such statement. The Court will schedule a hearing to address Plaintiffs' claims for such damages.

Dated this 22nd day of October, 1996.

/s/ Steven A. Felsenthal
HONORABLE
STEVEN A. FELSENTHAL
United States Bankruptcy Judge

Agreed as to form:

/s/ Sander L. Esserman
Sander L. Esserman
Stutzman & Bromberg
a Professional Corporation
2323 Bryan Street
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Counsel for Plaintiffs

/s/ Todd Barton
Steven A. Goodwin
S. Todd Barton
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200 Crescent Court
Suite 1500
Dallas, Texas 75201

Counsel for Defendant

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:)
) BK. NO: 390-37213-SAF-11
NATIONAL GYPSUM)
D E B T O R)

ADV. NO: 395-3480

* * * * * * * * * * * *

TRANSCRIPT OF PROCEEDINGS

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(Court's Ruling)

(Filed Jan. 21, 1997)

September 20, 1996 Dallas, Texas

Cindy Sumner, CSR

[2] **BE IT REMEMBERED**, that on the 20th day of September, 1996, before the **HONORABLE STEVEN FELSENTHAL**, United States Bankruptcy Judge at Dallas, Texas, the above styled and numbered cause came on for hearing, and the following constitutes the transcript of such proceedings as hereinafter set forth.

[3] P R O C E E D I N G S

THE COURT: Good morning. We're on the record, so let me get appearances.

MR. MURDOCK: This is David Murdock in Pittsburg for ACMC and the NGC Settlement Trust.

MR. ESSERMAN: This is Sander L. Esserman from Stutzman & Bromberg, local counsel for ACMC and the Trust.

MR. GOODWIN: This is Steve Goodwin with Carrington, Coleman on behalf of Insurance Company of North America.

MR. NILES: This is John Niles and Richard Zeller with Century Indemnities Company.

THE COURT: Thank you. I appreciate that you're available. This will not be a very long decision, but this is the most efficient way to communicate it to you.

The National Gypsum Settlement Trust and Asbestos Claims Management Corporation, which I will refer to collectively as "the Trust," have filed a declaratory judgment action seeking a determination by this Court that amounts asserted by the Insurance Company of North American under Section 20 of the Wellington Agreement allegedly due pre-National Gypsum's confirmation may not be pursued against them. The Trust [4] filed a Motion for Summary Judgment, which was opposed by INA. The Court conducted a hearing on the motion on September 10th, 1996. This Bench Ruling constitutes the Court's ruling on that motion.

INA has asserted a claim under Section 20 of the Wellington Agreement. National Gypsum Company assumed the Wellington Agreement during its bankruptcy case. Section 365 of the Bankruptcy Code requires that the debtor cure default in order to assume an executory contract. INA contends that the amount due under the Wellington Agreement has to be cured with the

assumption, but that National Gypsum did not provide notice of a motion to assume the agreement. The Trust observes, however, that assumption under Section 365 was part of the National Gypsum plan confirmation process. Exhibit F to the plan stated a cure amount of zero. The Court confirmed the plan with that amount.

INA did not object to the plan or to that amount, nor did it seek relief from the confirmation order, nor did it seek to litigate the cure amount pursuant to the Court's retention of jurisdiction in the confirmation order. The Trust therefore asserts that Pursuant to Sections 1141 and 524 of the Bankruptcy Code and the plan's provisions as confirmed by Court order, INA is enjoined from seeking to collect any alleged [5] amount due under the Wellington Agreement as of the confirmation date.

As and aside, INA contends that certain amounts became due post-confirmation. The Trust stipulates that amounts due post-confirmation are not part of this declaratory judgment action. Under Federal Rule of Civil Procedure 56C made applicable by Bankruptcy Rule 7056, summary judgment may be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits show that there is no genuine issue of material facts and that the moving party's entitled to judgment as a matter of law. The Court must draw inferences in the light most favorable to the party opposing the motion. The Movant bares [sic] the initial burden of articulating the basis for its motion and the underlying evidence which shows its entitlement to judgment. The Respondent may not rest on the mere allegations or denials in this pleading, but must set forth the specific facts showing a genuine issue for trial.

The issue raised by the summary judgment motion, whether INA had notice of the assumption of the Wellington Agreement sufficient to meet the requirement of due process to be enjoined from pursuing collection of pre-confirmation claims. Viewing the summary judgment [6] evidence in the light most favorable to INA as the party opposing the motion, the Court concludes that there are genuine issues of material fact of whether INA received formal notice of a motion or notice of intent to assume the Wellington Agreement, formal notice of the confirmation hearing with the plan showing assumption of the Agreement with a zero cure amount, and formal notice of the entry of the confirmation order. The Court assumes for purposes of this summary judgment motion that INA did not receive those formal notices.

Nevertheless, there are no genuine issues of material fact concerning the following: INA was provided notice of the meeting of creditors with the bar date for filing non-asbestos injury or damage claims. That notice also provided service instructions. At that time, National Gypsum was participating in the C.C.I. with asbestos claims being litigated, settled and paid through various insurance arrangements, including the Wellington Agreement. INA received notice and had actual knowledge that National Gypsum obtained relief from the bankruptcy court to continue that participation during the bankruptcy case. National Gypsum provided INA with notice of the hearing for approval of the disclosure statement. That notice also provided INA with the last date to object to the disclosure statement. The [7] disclosure statement included Annex 1, the first amended National Gypsum plan which stated on Page 33 that the plan incorporated a

request under Section 365 of the Code to reject executory contracts, except those on Exhibit F which the debtor proposed to assume with the stated Section 365 cure amount. Exhibit F listed the Wellington Agreement with "Various asbestos producers and insurers" with a zero cure amount. INA's attorney who was representing INA in the Stonewall litigation in the United States District Court of New York, the litigation that addressed remaining insurance coverage issues for National Gypsum asbestos claims, was also provided notice of the setting and resetting of the status and scheduling conferences designed to fix the procedures for the National Gypsum plan confirmation hearing.

INA was also given notice of the entry of the Court's order finding substance of confirmation of the plan in July 1993. There are also no genuine issues of material facts that INA knew of the bankruptcy case and the continued participation of National Gypsum in the C.C.I., which involved the Wellington Agreement. The Court must determine whether this actual notice of the National Gypsum's bankruptcy proceedings was sufficient to satisfy due process to enjoin INA from asserting pre-confirmation date claims.

[8] According to INA, National Gypsum owed it amounts pre-petition. INA therefore had a claim under the code. INA had formal notice of the claim's bar date and had actual knowledge of the bar date. Thus, if this case involved only the issue of filing a pre-petition claim, INA would be barred without dispute. INA filed no proof of claim. INA also asserts post-petition, but pre-confirmation claims, which it could have asserted as an administrative expense.

The facts not subject to genuine dispute place INA in the position of the SEQUA Group in the Christopher Case. The Fifth Circuit holds that a Motion for Administrative Expense would be barred. Under Section 365, INA would be entitled to a cure payment upon assumption irrespective of whether it claimed a proof of claim or a Motion of Administrative Expense. Nevertheless, this Court concludes that Christopher controls.

Under the facts of this case not subject to genuine dispute, this Court could not discert [sic] a compelling reason why this Fifth Circuit Case Law should not govern. INA with knowledge of the bankruptcy case knew that it was a party to an executory contract. It received no notice of intent to reject that contract. It had reason to believe that the contract would be assumed, [9] because it knew that National Gypsum had stay relief and was continuing to participate in the C.T.R. It had notice of the disclosure statement hearing. The disclosure statement had the plan attached. The plan addressed how contracts would be assumed under Section 365 with an exhibit listing the Wellington Agreement with a zero cure amount. The plan also contained provisions for retaining bankruptcy court jurisdiction to determine cure amounts, if contested. INA's counsel had notice of the conferences set by the Court to determine the confirmation proceedings. The Court also observed that NGC gave notice of confirmation by publication.

Under these circumstances, INA had sufficient notice to enable it to monitor the National Gypsum Case, to attend the meeting of creditors, to file claims, to attend the disclosure statement hearing, to read the plan as an annex to the disclosure statement after receiving notice of

the disclosure statement hearing and to attend the conference of the scheduling conference to establish the schedule for the confirmation hearing after receiving notice of that conference. Under the teaching of Christopher, INA had sufficient notice to be apprised of the pendency of the action that would affect the Wellington Agreement and sufficient time to permit it to present an objection to the cure amount.

[10] This Court can discern no due process difference for the sufficiency of a notice to file an objection to the assumption of a contract as compared to file a claim, or file an administrative expense, or file an objection to the discharge of a debt, or the discharge of a debtor. Each directly affects a person's rights against a bankruptcy estate and a debtor. The Court appreciates that other circuits might reach a different resolve, but this Court must apply the teachings of Christopher.

Based on the facts not subject to genuine dispute, the Court concludes that the notice was sufficient for due process. The provisions of the plan, per Court order, and the Bankruptcy Code therefore bar the enforcement of the Section 20 Wellington Agreement claims pre-confirmation. The zero cure amount determination is binding in the circuit pursuant to republic supply and show. INA had more than ample opportunity to appear before this Court to preserve its cure amount, object to the plan with a zero cure amount, attend the confirmation hearing, pursue cure litigation through the provision of the confirmation order and/or seek relief of that order by post-order motion or appeal.

The Fifth Circuit view of due process notice and the obligations of the creditor to protect its position when it actually knows about a bankruptcy proceeding with [11] sufficient time to act has been developing since at least 1989 when the Fifth Circuit in the Roba Tech decision admonished creditors if they failed to act at their peril. Due process should not be construed to excuse an entity from acting when it has sufficient notice and time to act to protect its interest. Especially in the context of a contested matter in the bankruptcy case as contrasted with and not involving the jurisdictional considerations of the service of a summons to respond to a complaint.

It is, however, troubling to this Court that National Gypsum did not give the specific formal notice required by the Court of the intent to assume executory contracts, or the solicitation package for confirmation including the plan with Exhibit F and the date of the confirmation hearing and the date for filing objections to the plan. The Court is also troubled by the lack of evidence of serving the confirmation order on INA. For purposes of this Summary Judgment Ruling, the Court has assumed that INA did not receive those notices. Those former notices should have been given, but their absence under the facts of this case in light of Christoper don't affect due process.

Based on this Ruling, the Trust Motion for Summary Judgment is granted. The Trust motion request [12] that the Court set a hearing for a determination of attorneys' fees and expenses. The Court will set that hearing, but cautions the parties concerning further expenses given the formal notice issues and the different views of the circuit courts on this issue.

Mr. Murdock or Mr. Esserman, if you'd please give me a written order granting the the [sic] motion based on this Ruling, I'd appreciate it.

MR. MURDOCK: We will, Your Honor. Thank you.

THE COURT: Thank you all very much.

(End of Court's Ruling.)

[13] C E R T I F I C A T E

I, CINDY SUMNER, Acting Official Court Reporter in and for the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, certify that during the hearing of the above-entitled and numbered cause, I reported in shorthand the proceedings hereinafter set forth, and that the foregoing pages contain a full, true and correct transcript of said proceedings.

/s/ Cindy Sumner
CINDY SUMNER

Certified Shorthand Reporter
#8032
Acting Official Court Reporter
United States Bankruptcy Court
Northern District of Texas
Dallas Division

SECTION 101 (11 U.S.C. § 101)

Sec. § 101. Definitions.

* * *

(5) "claim" means –

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

* * *

(10) "creditor" means –

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim;

* * *

(12) "debt" means liability on a claim;

* * *

SECTION 365 (11 U.S.C. § 365)

§ 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

* * *

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease –

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title,

immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title –

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title –

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

* * *

SECTION 502 (11 U.S.C. § 502)

§ 502. Allowance of claims or interests

* * *

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or

(e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

* * *

SECTION 503 (11 U.S.C. § 503)

§ 503. Allowance of administrative expenses

* * *

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

* * *

SECTION 1141 (11 U.S.C. § 1141)

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such

creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not –

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if –

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1001

Rule 1001. Scope of Rules and Forms; Short Title

The Bankruptcy Rules and Forms govern procedure in United States Bankruptcy Courts in cases under chapters 7, 9, 11 and 13 of title 11 of the United States Code. The rules shall be cited as the Bankruptcy Rules and the forms as the Official Bankruptcy Forms. These rules shall be construed to secure the expeditious and economical administration of every case under the Code and the just, speedy, and inexpensive determination of every proceeding therein.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 3003

Rule 3003. Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases

(a) Applicability of Rule

This rule applies in chapter 9 and 11 cases.

* * *

(c) Filing Proof of Claim

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(2) *Who Must File.* Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

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FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 3017

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

(a) Hearing on Disclosure Statement and Objections Thereto

Following the filing of a disclosure statement as provided in Rule 3016(c), the court shall hold a hearing on not less than 25 days notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider such statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the trustee, any committee appointed under the

Code and such other entity as may be designated by the court, at any time prior to approval of the disclosure statement or by such earlier date as the court may fix. In a chapter 11 reorganization case, every notice, plan, disclosure statement, and objection required to be served or mailed pursuant to this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.

(b) Determination on Disclosure Statement

Following the hearing the court shall determine whether the disclosure statement should be approved.

(c) Dates Fixed for Voting on Plan and Confirmation

On or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.

(d) Transmission and Notice to United States Trustee, Creditors and Equity Security Holders

On approval of a disclosure statement, unless the court orders otherwise with respect to one or more unimpaired classes of creditors of equity security holders the debtor in possession, trustee, proponent of the plan, or clerk as ordered by the court shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee, (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice

of the time within which acceptances and rejections of such plan may be filed; (4) such other information as the court may direct including any opinion of the court approving the disclosure statement or a court approved summary of the opinion. In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders pursuant to Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. In the event the opinion of the court is not transmitted or only a summary of the plan is transmitted, the opinion of the court or the plan shall be provided on request of a party in interest at the expense of the proponent of the plan. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the expense of the proponent of the plan, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record at the date the order approving the disclosure statement was entered.

(e) Transmission to Beneficial Holders of Securities

At the hearing held pursuant to subdivision (a) of this rule the court shall consider the procedures for transmitting the documents and information required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes and other securities and determine the adequacy of such procedures and enter such orders as the court deems appropriate.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 6006

Rule 6006. Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases

(a) Proceeding To Assume, Reject, or Assign

A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014.

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(c) Notice

Notice of a motion made pursuant to subdivision (a) or (b) of this rule shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 9014

Rule 9014. Contested Matters

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.